

PROFESSIONAL MEN OF LAW BEFORE  
THE LORDS OF COUNCIL, c.1500-c.1550

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VOLUME ONE

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## **Declaration**

I certify that this thesis is entirely my own work and that no part of it has been published previously in the form in which it is now presented.



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## CONVENTIONS AND ABBREVIATIONS

Dates are given in old style (Julian calendar), but with the year beginning on 1 January.

Quotations from manuscript are given in the original spelling but the letters *u* and *v* have been modernized where the sense required. Contractions have been expanded. Names have been modernized where possible. Currency referred to is Scots currency unless otherwise indicated.

The following abbreviations are used:

<i>A.D.A.</i>	Acts of the Lords Auditors of Causes and Complaints, 1466-1496 (ed.) T. Thomson (Record Commission, 1839).
<i>A.D.C.</i> , i	Acts of the Lords of Council in Civil Causes ( <i>Acta Dominorum Concilii</i> ) 1478-1495 (ed.) T. Thomson (Record Commission, Edinburgh, 1839).
<i>A.D.C.</i> , ii	Acts of the Lords of Council in Civil Causes ( <i>Acta Dominorum Concilii</i> ) 1496-1501 (edd.) G. Neilson and H. Paton (Edinburgh, 1918).
<i>A.D.C.</i> , iii	<i>Acts of the Lords of Council, 1501-1503</i> , (ed.) A.B. Calderwood (Edinburgh, 1993).
<i>A.D.C. (Stair)</i>	<i>Acta Dominorum Concilii, 1501-1503</i> , (ed.) J.A. Clyde, (Stair Society; Edinburgh, 1943).
<i>A.D.C.P.</i>	<i>Acts of the Lords of Council in Public Affairs, 1501-1554</i> , (ed.) R.K. Hannay (Edinburgh, 1932)
<i>A.P.S.</i>	<i>Acts of the Parliaments of Scotland</i> , (edd.) T. Thomason and C. Innes (Record Commission, 1844-75).
Balfour, <i>Practicks</i>	Sir James Balfour of Pittendreich, <i>Practicks</i> 2 vols., ed. P.G.B. McNeill (Stair Society, 1962-3).
Baker, <i>IELH</i>	J.H. Baker, <i>An Introduction to English Legal History</i> 3rd Edition. (London, 1990).
Cameron, <i>Personal Reign</i>	J. Cameron, 'Crown-Magnate Relations in the Personal Reign of James V' (unpublished Ph. D. thesis, University of St. Andrews, 1994)

C.C. 8	Commissary Court of Edinburgh, Manuscript Register of Testaments.
Chalmers, <i>King's Council</i>	T.M. Chalmers, 'The King's Council, Patronage and the Governance of Scotland, 1460-1513' (unpublished Ph.D. Thesis, University of Aberdeen, 1982)
Clark, <i>Lawburrows</i>	G.B. Clark, 'The Remedy of Lawburrows in Scots Law' (unpublished LL.M. Dissertation, University of Edinburgh, 1985)
C.S. 1	Manuscript Books of Sederunt
C.S. 5	Manuscript Acts of the Lords of Council
C.S. 6	Manuscript Acts of the Lords of Council and Session
C.S. 7	Manuscript Register of Acts and Decrees
Douglas, <i>Baronage</i>	Sir Robert Douglas, <i>The Baronage of Scotland</i> , (Edinburgh, 1798).
<i>Edin. Accs.</i>	<i>Edinburgh Records: The Burgh Accounts</i> , (ed.) R. Adam, (Edinburgh, 1899).
<i>Edin. Burgess Roll</i>	<i>Roll of Edinburgh Burgesses and Guild Brothers, 1406-1700</i> , (ed.) C.B.B. Watson, (Scottish Record Society, 1929).
<i>Edin. Burgh Recs.</i>	Extracts from the Records of the Burgh of Edinburgh, 6 vols. (Scottish Burgh Records Society, 1871-1931).
Emond, <i>Minority</i>	W.K. Emond, 'The Minority of James V' (unpublished Ph.D. Thesis, University of St. Andrews, 1988).
<i>E.R.</i>	Exchequer Rolls of Scotland, 23 vols., (Edinburgh 1878-1908)
E.U.L.	Edinburgh University Library
<i>Fife Sheriff Ct. Bk.</i>	Sheriff Court Book of Fife (ed.) W.C. Dickinson (Edinburgh, 1928).
Fraser, <i>Lennox</i>	Sir William Fraser, <i>The Lennox</i> , 2 vols. (Edinburgh, 1874).

Fulton, <i>Social Criticism</i>	R.W.M. Fulton, 'Social Criticism in Scottish Literature 1480-1560' (unpublished Ph.D. Thesis, University of Edinburgh, 1972).
Goodare, <i>Parliament and Society</i>	J.M. Goodare, 'Parliament and Society in Scotland 1560-1603' (unpublished Ph.D. Thesis, University of Edinburgh, 1989).
Hannay, <i>College of Justice</i>	R.K. Hannay, <i>The College of Justice</i> (Stair Society, 1990).
Hume, <i>Crimes</i>	David Hume, <i>Commentaries on the Law of Scotland Respecting Crimes</i> 2 vols. (1986 reprint, Edinburgh).
Jamieson, <i>Robert Henryson</i>	I.W.A. Jamieson, 'The Poetry of Robert Henryson: A Study of the Use of Source Material' (unpublished Ph.D. Thesis, University of Edinburgh, 1965).
J.R.	Juridical Review
Kelham, <i>Magnatial Power</i>	C. Kelham, 'Bases of Magnatial Power in Later Fifteenth Century Scotland' (unpublished Ph.D. Thesis, University of Edinburgh, 1986).
Kelley, <i>Douglas Earls of Angus</i>	M.G. Kelley, 'The Douglas Earls of Angus: A Study in the Social and Political Bases of Power of a Scottish Family from 1389 to 1557' (unpublished Ph.D. Thesis, University of Edinburgh, 1973).
MacQueen, <i>Common Law</i>	H.L. MacQueen, <i>Common Law and Feudal Society in Medieval Scotland</i> (Edinburgh, 1993).
Meikle, <i>Lairds and Gentlemen</i>	M.M. Meikle, 'Lairds and Gentlemen: A Study of the Landed Families of the Eastern Anglo-Scottish Borders c. 1540-1603' (unpublished Ph.D. Thesis, University of Edinburgh, 1989).
Murray, <i>Exchequer and Crown Revenue</i>	A.L. Murray, 'The Exchequer and Crown Revenue of Scotland 1437-1542' (unpublished Ph.D. Thesis, University of Edinburgh, 1962).
N.L.S.	National Library of Scotland, Edinburgh
NRA(S)	National Register of Archives in Scotland
Omond, <i>Lord Advocates</i>	G.T. Omond, <i>The Lord Advocates of Scotland</i> 2 vols., (Edinburgh, 1883).



Pitcairn, <i>Criminal Trials</i>	R. Pitcairn (ed.), <i>Criminal Trials in Scotland</i> 2 vols., (Bannatyne Club, 1833).
P.S.	Manuscript Register of the Privy Seal.
R.M.S.	Register of the Great Seal of Scotland, ( <i>Registrum magni sigilli regum Scotorum</i> ) (edd.) J.M. Thomson and others (facsimile edition, Edinburgh, 1984).
Rot. Scot.	<i>Rotuli Scotiae</i> (ed.) D. Macpherson and others, 2 vols., (1814-1819).
R.P.C.	Register of the Privy Council of Scotland (First series) vols. i-iii (Edinburgh, 1877-1898).
R.S.S.	Register of the Privy Seal of Scotland ( <i>Registrum secreti sigilli regum Scotorum</i> ) (edd.) M Livingstone and others, 7 vols. (Edinburgh, 1908-1966).
S.R.O.	Scottish Record Office, Edinburgh.
Skene, D.V.S.	Sir John Skene, <i>De Verborum Significatione</i> (Edinburgh, 1597).
T.A.	Accounts of the Lord High Treasurer of Scotland (edd.) T. Dickson and others, 13 vols. Edinburgh, 1877-1978).
T.R.H.S.	Transactions of the Royal Historical Society
T.D.G.N.H.A.S.	Transactions of the Dumfries and Galloway Natural History and Antiquarian Society
van Rhee, <i>Great Council of Malines</i>	C.H. van Rhee, 'Litigation and Legislation: Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)', (Ph.D Thesis, Leiden, 1997).
Wasser, <i>Central Criminal Courts</i>	M.B. Wasser 'Violence and the Central Criminal Courts in Scotland 1603-1638' (Ph.D Thesis, Columbia University, 1995).

Titles of other works may be shortened in footnotes after the first citation.

## **Abstract**

In 1532, James V founded a College of Justice. In the past lawyers and historians have often differed in their opinions of the significance of this event for the history of Scots law. What is beyond dispute is that a by-product of the foundation was the preservation, for the first time, of the names of professional men of law whose practice linked them directly to a Scottish court. The men on this list, and another preserved from 1549, provide the earliest opportunity to study in depth men of law in their professional context.

Described by a variety of titles, of which 'advocate' is the best known today, the careers of these men illustrate the evolution of increasingly sophisticated procedures of the lords of council and the College of Justice, and the not inconsiderable ability of those who pled before these bodies on a regular basis. In the relatively short period considered in this study, professionalisation of the function of the legal representative in Scotland advanced significantly. For the first time the king used his own advocate on a regular basis to defend and pursue his legal interests. During the reign of James V, a single advocate also became associated with the queen mother. Further down the social scale, amongst both clerics and laymen, similar, if sometimes less durable, relationships were formed with professional men of law. Legal representation of the poor is also well attested during this period.

For the first time records allow contemporary relationships between men of law and their clients to be compared, and in some cases details of the terms upon which those

relationships were entered into and maintained have survived. These indicate that various services were provided by men of law beyond the core activities of rendering advice and representation to their clients in return for a fee.

The standing of Scottish men of law, not only within their own society but also by comparison with men who followed a legal career in England, France, Castile and the Low Countries, was broadly favourable in terms both of social status and educational background. In this thesis they are studied collectively and individually, and placed within the context of their own time as well as within the context of the wider history of the legal profession.

## Chapter One

### Legal Practitioners in Sixteenth Century Scotland

#### Introduction

What follows is not a study of the legal profession during the reign of James V. Rather it is a study which has as its basis a particular group of professional lawyers who lived and worked during that period. This is an important distinction yet it depends upon how the terms 'profession' and 'professional' are defined. Historians of English law have produced workable criteria which may be used as the basis for defining these terms. Paul Brand has suggested that a person qualifies as a professional lawyer when he is recognised by others as having particular knowledge or expertise in relation to the law; he is willing to put that expertise at the disposal of others and receives payment for doing so, and this activity takes up a major part of his time.<sup>1</sup> This is an elaboration on broadly similar criteria which were suggested by Robert Palmer, although the latter had included the requirements that to be a professional the greater part of a person's income must be derived from his activity as a lawyer and that this activity must be continued over a number of years.<sup>2</sup> Both definitions excluded formal educational requirements and neither considered it essential that the lawyer be willing to put his services at the disposal of all comers.

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<sup>1</sup> P. Brand, *The Origins of the English Legal Profession*, (Oxford, 1992), preface, vi. Henceforth, Brand, *Legal Profession*.

<sup>2</sup> R.C. Palmer, *The County Courts of Medieval England, 1150-1350*, (Princeton, 1982), 89.

These definitions are a useful starting point for the present study although they require to be slightly modified. As will become evident, it is impossible to tell from the existing records what proportion of their time was spent by Scottish men of law acting in court or preparing cases. Nor is it possible to assess how much of their income derived from their legal activity. What is clear is that a significant number of Scots during the reigns of James IV and James V potentially qualify as professional lawyers, at least under Dr. Brand's definition, although in many cases it would be impossible to find evidence that they were paid for their services. The original eight general procurators admitted to the College of Justice in 1532, the men who form the core of this study, undoubtedly fulfil these criteria. But do they constitute a 'legal profession'? The criteria offered by Brand in this regard are again interesting. In his view, a profession exists when professional lawyers are made subject to regulation, including a limit on their numbers in a particular court, or minimum standards of competence or particular standards of behaviour.<sup>3</sup> Essentially, the defining characteristics of a legal profession in these terms are control over entry into its ranks and disciplinary control over recruits once entry has been gained. The control need not be exercised by the lawyers themselves; it can be imposed externally. In Scotland, as will be shown later, both criteria were met in 1532 with control over entry and discipline exercised by the lords of council.<sup>4</sup>

The danger in transplanting these criteria into Scotland lies in the fact that it invites the misconception, which only research into the manuscript sources can avoid, that the

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<sup>3</sup> Brand, *Legal Profession*, preface, vii.

<sup>4</sup> Chapters three and four, below.

legal profession was created along with the College of Justice in 1532. In the past some scholars have even sought to retrace the existence of the Faculty of Advocates to that date.<sup>5</sup> The very title of Francis Grant's book, *The Faculty of Advocates in Scotland, 1532-1943*, suggests certainty as to its date of origin.<sup>6</sup> Yet neither the legal profession, nor the Faculty of Advocates, can be ascribed to legislative fiat in 1532. If, however, Dr. Brand's criteria are understood as a basic litmus test for the existence of a legal profession, then it can be asserted with reasonable confidence that no such profession existed in Scotland prior to 1500. There were certainly professional men of law before that time but there is no evidence of control over entry to the profession or disciplinary control over a particular group. There are indications that these criteria were being fulfilled in the 1520s and the statutes of 1532 do provide evidence for the existence (as opposed to the creation) of a legal profession in terms of Brand's criteria. As with contemporary England, the difficult question remains of precisely who should be included in its ranks. Professor J.H. Baker, in looking at English professional lawyers of the period 1450-1550, has questioned whether they comprised a single profession.<sup>7</sup> In looking at the diversity of English lawyers, and the lack of 'a comprehensive professional structure', he found a unifying factor in their association with the inns of court and chancery while acknowledging that membership of an inn was not exclusive to lawyers and so could not be accepted as defining the legal profession.

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<sup>5</sup> E.g., Nan Wilson, 'The Scottish Bar: The Evolution of the Faculty of Advocates in its Historical Social Setting', *Louisiana Law Review*, xxviii, (1968), 235. Henceforth Wilson, 'Faculty of Advocates'.

<sup>6</sup> F.J. Grant, (ed.), *The Faculty of Advocates in Scotland, 1532-1943*, (Edinburgh, 1944). For criticism of Grant's work, see N.T. Phillipson, *The Scottish Whigs and the Reform of the Court of Session, 1785-1830*, (Edinburgh; Stair, Society, 1990), Appendix B.

<sup>7</sup> J.H. Baker, 'The English Legal Profession, 1450-1550' in *The Legal Profession and the Common Law*, (London, 1986), 75-78. Henceforth, Baker, 'The English Legal Profession'.

The very mention of ‘inns of court’, however, illustrates the divergence between Scots lawyers and their contemporaries in England in the fifteenth and sixteenth centuries. Professional lawyers were certainly diverse in Scotland, and from the outset advocates and writers to the signet performed different functions which were clearly reflected by the legislation of 1532.<sup>8</sup> As will be demonstrated in more detail below, there were notaries, procurators, advocates and forespeakers. But these are not to be compared with the separate branches of the English legal profession. Indeed in Scotland the same individual might be a notary and be found in various records described as a procurator, forespeaker and advocate. A good example of a leading man of law who was also a notary is Master John Williamson who was one of the most active procurators before the lords of council during the reign of James IV.<sup>9</sup> Several of his contemporaries as procurators, including Adam Otterburn, James Henryson and John Lethame, were also notaries. This lack of a clear distinction creates some difficulty in deciding who should be included in the ranks of the Scottish legal profession in the 1530s. The king’s advocate is the most obvious candidate for inclusion and yet, as a lord of session in his own right, he might be better classified as a member of the judiciary. It would be difficult to exclude those practising exclusively before the church courts, while those who were not named as general procurators to the College of Justice yet still appeared before it regularly as procurators in the 1530s (although in some cases these were probably men serving an apprenticeship and so cannot be considered fully-fledged professionals). Moreover it will be suggested later that the view that in 1532 a number of advocates were given the exclusive right to plead

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<sup>8</sup> On writers to the signet see R.K. Hannay, *College of Justice*, (Stair Society; Edinburgh, 1990), 311-3.

<sup>9</sup> E.g. Scottish Record Office (S.R.O.), Broughton and Cally Muniments, G.D. 10/623: 17 October, 1507.

before the new College of Justice is open to doubt. It may be enough simply to suggest, as Prest does in relation to English lawyers, that the general procurators admitted in 1532 represented a relatively small band of 'high-status practitioners' who stood at the head of the profession.<sup>10</sup> To date, however, very little has been written about them, and even less about those who appeared in lower courts as procurators. Without knowing more about all of those who might conceivably fulfil Brand's definition of 'professional lawyer' during the reign of James V, it would be extremely dangerous to attempt to define the membership of the legal profession at that date.

Nor is the emergence of a 'legal profession' in Scotland precisely dateable. The fact that a small group of advocates was regulated to a certain extent by the lords of council prior to 1532 merely adds to the difficulty. The earliest evidence of the existence of an organisation akin to the Faculty of Advocates so far discovered dates from 1582. Significantly this is a reference to an individual, John Shairp, as 'dene of the advocattis of the session' rather than to the body itself.<sup>11</sup> No mention of a 'dean of faculty' has been found until 1619.<sup>12</sup> Although there are signs of corporate identity amongst the generation of lawyers examined in this study, it is true to say that the development of the Faculty of Advocates was vital to the development of a 'professional legal caste'.<sup>13</sup> Unfortunately it is not until the 1550s that the books of sederunt survive which record the swearing of admission oaths by those admitted as advocates before the College of Justice. The basis of the oath was an act of 1429 in

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<sup>10</sup> Prest, W., (ed.), *The Professions in Early Modern England*, (New York, 1987), 66.

<sup>11</sup> *R.P.C.*, iii, 530; M.H.B. Sanderson, *Mary Stewart's People*, (Edinburgh, 1987), 23.

<sup>12</sup> Hannay, *College of Justice*, 150.

<sup>13</sup> Alexander Murdoch, 'The Advocates, The Law and The Nation in Early Modern Scotland', in (ed. W. Prest), *Lawyers in Early Modern Europe and America*, (New York, 1981), 149.



which ‘advocatis & forespekaris in temporalle courts pledande’ were to swear that the cause which they put forward was just, and that they would not use false evidence nor seek to delay a legal action without cause.<sup>14</sup> In 1556 it was recorded on 12 November that:

‘the haill advocattis & procuratouris maid feyth in presens of the haill lordis that thai sall lelelie & trewli procur for thir clientis & sall observe & keip the statutis of sessioun’.<sup>15</sup>

The previous year, on 13 November, twelve advocates, individually named, swore the same oath and two other advocates were then received and sworn for the first time.<sup>16</sup> This pattern, of an annual oath being sworn and new admissions being taken on the first court day following Martinmas, was maintained in the 1560s. John Spens of Condie was sworn as an ordinary lord of session on 12 November 1561, following which John Monypenny was admitted advocate and all the lords, procurators, scribes and macers ‘maid fayth as use is conforme to the statutes’.<sup>17</sup> On the same day extraordinary lords and two new macers were also admitted. The significance of the period ‘eftir martimes’ (Martinmas), as the record put it, was underlined in 1562 when normal scribal practice was departed from and lords who were absent, instead of being simply ignored, were named and specifically ‘excepted’ from the sederunt.<sup>18</sup> Whether this particular court day had the same annual significance during the reign of James V is not particularly evident from the *acta*, although a new session can be dated to 12

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<sup>14</sup> *A.P.S.*, ii, 19.

<sup>15</sup> *C.S.* 6/29 fol. 33v: 12 November, 1556.

<sup>16</sup> *C.S.* 6/29 fol. 4v: 13 November, 1555.

<sup>17</sup> *C.S.* 1/2/1 fols. 30r-31r: 12 November, 1561.

<sup>18</sup> *C.S.* 1/2/1 fol. 63r: 12 November, 1562. Normally the sederunt simply listed those lords who were present, either listing their names or comparing that day’s sederunt to the previous day. Judges who were absent were therefore not named.

November 1532.<sup>19</sup> Prior to this, a sederunt is not always recorded on that date, but thereafter, it appears to have been.<sup>20</sup> The first court day after Martinmas seems also to have had significance elsewhere. In France, for example, the earliest list of *avocats* before the *Parlement* of Paris dates from the first court day after Martinmas in the year 1340.<sup>21</sup>

In Scotland there were by 1590 some fifty advocates admitted to appear before the lords and there is also evidence that in some cases they had been admitted on probation under the supervision of senior advocates. Even so, there was still no self-regulation. The number of advocates continued to increase dramatically throughout the seventeenth and eighteenth centuries until, by around 1710, there were two hundred of them.<sup>22</sup> The increasing size of the number of legally trained professionals mirrors similar increases during this period elsewhere in Europe and recent scholarship has stressed the international connections and experiences of Scottish advocates during this period, in particular their tendency to be educated on the continent.<sup>23</sup>

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<sup>19</sup> C.S. 6/2 fol. 1r.

<sup>20</sup> On that day a sederunt was recorded in 1525, (C.S. 5/35 fol. 155v), but not in 1524 (C.S. 5/34) nor in 1526, although a Parliament was called for 12 November in this year (C.S. 5/36 fol. 95r). In 1533 (C.S. 6/3 fol. 74r) and 1534 (C.S. 6/5 fol. 131r) sederunts are recorded on 12 November.

<sup>21</sup> Roland Delachenal, *Histoire des Avocats au Parlement de Paris 1300-1600*, (Paris, 1885), 24. Henceforth, 'Delachenal, *Histoire des Avocats*'.

<sup>22</sup> N. Phillipson, 'Lawyers, Landowners, and The Civic Leadership of Post-Union Scotland: An Essay on the Social Role of the Faculty of Advocates 1661-1830 in 18th Century Scotland', *Juridical Review*, (1976), 101. Henceforth, Phillipson, 'Civic Leadership'.

<sup>23</sup> Filippo Ranieri, 'From Status to Profession: The Professionalisation of Lawyers as a Research Field in Modern European Legal History', x, (1989), *Journal of Legal History*, 184; J. Durkan, 'The French connection in the sixteenth and seventeenth centuries' in *Scotland and Europe 1200-1850*, (ed.) T.C. Smout, (Edinburgh, 1986), 19; P. Neve, 'Disputations of Scots Students Attending Universities in the Northern Netherlands', in *Legal History in the Making*, (ed.) W.M. Gordon and T. D. Fergus, (London, 1991), 95; R Feenstra, 'Scottish-Dutch Legal Relations in the Seventeenth and Eighteenth Centuries' in *Scotland and Europe 1200-1850*, (ed.) T.C. Smout, (Edinburgh, 1986), 128.

Moreover, it is with this period of history that the idea of the 'legal family' is normally first associated. Several notable examples, the Hope and Lockhart families and, perhaps the best known, the family and descendants of Thomas Craig of Riccarton, provide fascinating illustrations of the significance and increasing importance of family connections to anyone wishing to pursue a successful legal career.<sup>24</sup> Lawyers were capable of significant upward social mobility which, as the seventeenth century progressed, began to make the pursuit of a legal career a desirable and honourable prospect for younger sons of the nobility.<sup>25</sup> The social status of the advocate, and the social profile of the Faculty of Advocates, underwent a significant change which has been dated to the period of the Restoration. Between 1670 and 1730 men of higher social position than hitherto sought and gained entry to the Faculty.<sup>26</sup> It has been argued that in the late seventeenth century, the advocates in the Faculty, led by George Mackenzie, viewed themselves as a learned society almost equivalent to a university: a status underpinned by the foundation of the Advocates' Library in 1689.<sup>27</sup>

In conjunction with a continuing focus on the institutional development of the Faculty of Advocates, a great deal of work needs to be done on the status, professional careers, and family connections of individual advocates in the century and a half following the foundation of the College of Justice. But the general trends are clear.

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<sup>24</sup> T.I. Rae, 'The Origins of the Advocates' Library', in *For the Encouragement of Learning: Scotland's National Library, 1689-1989*, (edd.) P. Cadell, and A. Matheson, (Edinburgh, 1989), 5. Henceforth, Rae, 'Advocates' Library'.

<sup>25</sup> Rae, 'Advocates' Library', 6.

<sup>26</sup> Phillipson, 'Civic Leadership', 100.

<sup>27</sup> J.W. Cairns, 'The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates', in *The Legal Mind*, (ed.) N. McCormick and P. Birks, (Oxford, 1986), 259-60; 'Sir George Mackenzie, the Faculty of Advocates, and the Advocates Library' in G. Mackenzie, *Oratio Inauguralis*, (Edinburgh, 1989), 23.

First, advocates were amongst the best-educated members of society. Late sixteenth century figures such as John Skene, Clement Litill and Thomas Craig (educated respectively at Wittenberg, Louvain and Paris) have been seen as representative of several generations of lawyer during the reign of James VI.<sup>28</sup> Hannay estimated that two-thirds of advocates admitted between 1575 and 1608 based their claim for admittance on their academic qualifications.<sup>29</sup> Secondly, family connections, which could be complex, were important. The profession of advocate was a useful vehicle to men ambitious for social and political advancement. Although appointment as a judge was not based upon the criterion of legal knowledge, and the proportion of appointed judges who had been practising advocates fluctuated between 1532 and 1707, the prospects of advancement for an advocate either to the bench, or to a position within the Faculty or as a sheriff depute or similar post, were good.<sup>30</sup> The third major characteristic of advocates was their wealth. As a result of their activities some advocates became very wealthy men, able to speculate in land and to lend out money.<sup>31</sup> As this thesis will demonstrate, all three of these characteristics of professional advocates may be found prior to 1550.

However it is unlikely that those earlier professional lawyers could properly be described as forming a legal profession if criteria even slightly more demanding than Brand's minimal test were applied. In her study of the medical profession in

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<sup>28</sup> Cairns, *Stair Memorial Encyclopedia*, volume 13, para 1241. It has been suggested that as well as studying arts at Paris, Craig also studied law in France: J.W. Cairns, T.D. Fergus and H.L. MacQueen, 'Legal Humanism in Renaissance Scotland', (1990), *Journal of Legal Studies*, 48.

<sup>29</sup> Hannay, *College of Justice*, 145.

<sup>30</sup> J.M. Simpson, 'The Advocates as Scottish Trade Union Pioneers', in *The Scottish Tradition*, (ed.) G.W.S. Barrow, (Edinburgh, 1974), 166 [henceforth, "Simpson, 'Advocates'"]; Phillipson, 'Civic Leadership', 104; Rae, 'Advocates' Library', 7.

<sup>31</sup> Rae, 'Advocates' Library', 7.

seventeenth century Edinburgh, Helen Dingwall applied a set of detailed defining factors which she considered must necessarily be present for any group to be regarded as a profession. These factors included entry requirements enforced by the group itself; entry examinations and initial supervision of entrants; self-regulation (including codes of conduct and disciplinary structures); and 'closure' (exclusion of non-professionals from the group). If such criteria were applied to the legal profession, they could not be fulfilled outwith the context of the Faculty of Advocates and, on this measure, the history of the legal profession begins no earlier than in the late sixteenth century and belongs primarily to the seventeenth. As Dingwall acknowledges, it is questionable whether twentieth-century criteria defining what a profession is should be applied to the sixteenth or seventeenth centuries at all.<sup>32</sup> To apply the concept of a legal profession to the early sixteenth century is to apply an external, and anachronistic, standard to men who, although probably willing to accept the contemporary description 'men of law' would not necessarily have allowed it to define them. Some of them spent considerable time pursuing other avenues of employment while some held administrative positions.<sup>33</sup> The most that can be said is that the group of lawyers to be studied here does fulfil the base-line criteria for the existence of a legal profession suggested by Brand. A more rigorous set of criteria, such as that suggested by Dingwall, could not be fulfilled until a much later date.<sup>34</sup>

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<sup>32</sup> Dingwall, *Physicians, Surgeons and Apothecaries: Medical Practice in Seventeenth Century Edinburgh*, (East Lothian, 1995), 11.

<sup>33</sup> Cf. Baker, 'The English Legal Profession', 76.

<sup>34</sup> Slightly different criteria have also been suggested in general remarks by J.A. Brundage, 'The Medieval Advocate's Profession', (1988), *Law and History Review*, 439-445. Henceforth, Brundage, 'Advocate's Profession'.

The advocates of 1532 have not been chosen for this study because they represent the origins of the legal profession in Scotland but because they are the first lawyers unambiguously connected with a particular court in Scotland whose names are known and whose careers may be studied in reasonable detail. Certainly it would have been possible to attempt a similar study in relation to an earlier generation of men of law although this would have involved identifying the most prominent practitioners according to more subjective criteria. It is doubtful if even this could be attempted for the period prior to the reign of James III, at which time the most useful source for such a study, the *acta* of the lords of council, begins to survive. To this consideration must be added the fact that, generally speaking, biographical information from the fifteenth century is less plentiful than it is in the early part of the sixteenth. If references in the *acta* were the only record of their activity, very little would ever be known of lawyers as individuals; although valuable as a source in respect of a wide variety of information, political, economic, and biographical, this source reveals surprisingly little about the personal lives of those men of law whose names appear in it most often. It is from supplementary information in other sources that meaningful study can be made of the lives and careers of these individuals.

The records which have been used in this study cover primarily the period 1504 to 1537. Various later volumes have also been used extensively but not as systematically, and use has been made of the published volumes of the *acta* between 1478 and 1504. But during the main period studied, the *acta* of the lords of council are unpublished. In 1932, R.K. Hannay produced a volume summarising some of the

information contained in the *acta* from 1504 to 1554.<sup>35</sup> Although a work of great consequence and expertly transcribed, containing much that is of interest to political and legal historians, it is unfortunately of limited value to anyone studying the men of law of this period not least because they are only very rarely named. Only by careful scrutiny of the manuscript volumes has it been possible to reconstruct and analyse their activities.

### Terminology

*'In principio erat verbum et verbum erat deum et deus erat verbum etc.'*<sup>36</sup>

In early sixteenth Scotland lawyers were variously described as advocates, forespeakers (or, in Latin, *prelocutors*), procurators and assessors. These terms were all of some antiquity but care should be taken in tracing their application since language changed over time and was used differently in different places. An early Anglo-Saxon use of the word *forespeca*, for instance, probably developed into the English common-law *narrator* (that is, someone empowered to make a statement of claim) although, as has recently been pointed out, the Scots *forespeaker* could undertake the running of an entire litigation and was not restricted to uttering the statement of claim.<sup>37</sup> Even sixteenth century Scottish scribes were themselves not always consistent in their use of language. Some wrote *forspeaker* rather than

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<sup>35</sup> *Acts of the Lords of Council in Public Affairs*, (ed.) R.K. Hannay, (Edinburgh, 1932).

<sup>36</sup> C.S. 5/23 fol. 2r. Portions of this phrase, evidently used as a writing exercise by the clerks of council, can be found in several places in the *acta*, although the quotation comes from the most complete example. The 'etc.' is original.

<sup>37</sup> M.T. Clanchy, *From Memory to Written Record*, (Oxford, 1993), 274; H.L. MacQueen, *Common Law*, 76.



*forespeaker* although whether this represented a substantive difference is doubtful.<sup>38</sup> Nonetheless this did mirror an inconsistency in the Latin equivalent of the term since both *prolocutor* and *prelocutor* are found. The sense is slightly different in that ‘*pro*’ suggests a person speaking on another’s behalf (whether or not he was present), whereas ‘*pre*’ suggests someone specifically standing before another person and speaking on his behalf. That this latter was the basic meaning of *prelocutor* or *forespeaker* in Scotland is certain. Almost without exception, these words were used when the litigant was present and his man of law was speaking on his behalf. It is unlikely however that there is any substantive difference in the meaning of the words *forspeaker* and *forespeaker*, or *prelocutor* and *prolocutor*, as they were used by the clerks of the lords of council in the first half of the sixteenth century. This is in spite of the fact that in 1493 David Balfour of Caraldston was described as ‘forespekkar, forspekkar and procurator for our soverane lord (i.e. the king)’.<sup>39</sup> There is no evidence that in practice a *forespeaker* was in any way distinct from a *forspeaker* and, indeed, it is possible to find both words used in the *acta* on the same day ostensibly with identical meaning.<sup>40</sup>

The distinction between *procurators* and *forespeakers* in some ways mirrors the contemporary distinction between ambassadors and *nuncii*. The ambassador was empowered to negotiate and conclude specific business. By virtue of this authority he acted as the representative or agent of his sovereign. The *nuncius* was also the

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<sup>38</sup> The word *forspeaker* was written in full; later it starts to be written with an obvious contraction, suggesting the spelling *forespeaker*.

<sup>39</sup> *A.D.C.*, I, 262: 21 January, 1493.

<sup>40</sup> E.g. C.S. 5/40 fols. 21r-v: 10 May, 1529. On this day there are references to Master Robert Leslie, ‘*forspekar*’, and Master James Foulis, ‘*forespekar*’.



sovereign's representative but lacked the same level of authority. For this reason *nuncii* were described, by writers such as Azo, as 'speaking letters', that is, enjoying the role merely of communicating a message without having any power to influence its content.<sup>41</sup> The procurator and the *forespeaker* should similarly be distinguished in terms of status although it would be misleading to characterise the *forespeaker* merely as a medium of communication between his client and the court. His role was to advise and to give counsel and, as the title suggests, to speak on his client's behalf and under his instructions. But it was the message that was important, the procedural steps taken, the argument adopted: those were the things which mattered. That is why in Scottish practice the presence of a *forespeaker* was not routinely recorded by the clerks of council. The presence of the principal was the important fact.

By standing at the bar of the court along with his man of law, the principal, in modern terminology, might be viewed as the 'controlling mind'. The responsibility for what was said on his behalf lay with him; if his *forespeaker* made a statement of which he disapproved then, presumably, he could disavow it and ensure that it was not recorded in the *acta* to his later disadvantage. Although the *forespeaker* had more influence over the content of the message he was delivering than was true of the *nuncius*, in both cases the message was unambiguously imputed to the principal.

By contrast the name of a procurator employed to represent another was almost without exception recorded. Men of law are therefore to be found described in the

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<sup>41</sup> Donald E. Queller, *The Office of Ambassador in the Middle Ages*, (Princeton, 1967), 7; G. Mattingly, *Renaissance Diplomacy*, (London, 1955), 28.

record as *procurator* three or four times as often as they were described as *forespeaker*.<sup>42</sup> In practice the *forespeaker* may sometimes have had no less input into the argument put forward in court than a procurator might have had. But in court the procurator was the master of the message. His client was not present to contradict or disavow him. Provided the procurator was properly constituted, and was acting within his authority, he bound his client by what he said and did in his name. As an ambassador was employed to negotiate, within his terms of reference, the content of a treaty, so the procurator might, according to his constitution, have responsibility for reaching a settlement judicially or by arbitration. The similarity is one which would have been obvious to contemporaries and it was not without reason that, in the days before resident embassies, ambassadors were also known as procurators.<sup>43</sup> In Scotland there is a lack of direct evidence concerning the precise extent of the powers of the *forespeaker*, and no details are known of when, or even whether, his client might disavow what he said. There is therefore much room for speculation and to inform it a comparative approach is useful.

The word *forespeaker* has its foreign equivalents, such as the *avant-parlier* found in places such as Brabant and also in France. By the time of Vincent de Beaumanoir in the late thirteenth century, however, ‘*avant-parlier*’ had fallen out of use in France in favour of the word *avocat*.<sup>44</sup> Interestingly, this followed a period when both words,

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<sup>42</sup> Robert Galbraith was described as procurator on 340 occasions, as either *forespeaker* (89) or *prelocutor* (27) on 116; Robert Leslie was a procurator on 475 occasions and *forespeaker* or *prelocutor* on 110. These are only identifiable references; sometimes they acted ‘in the name of’ a client and this did not simply mean they were acting as a procurator since on occasion such clients were personally present.

<sup>43</sup> Mattingly, *Renaissance Diplomacy*, 28-9.

<sup>44</sup> Delachenal, *Histoire des Avocats*, introduction, xvii.

*avocat* and *avant-parlier*, were used as synonyms by, for example, the compiler of the *Établissements de Saint Louis*.<sup>45</sup> According to Delachenal, the *avant parlier*, or *prolocutor*, was a true pleader; acting as the interpreter of his principal and treated as rigorously as if he himself were the principal. This meant that the *avant parlier* was unable to take back anything which he had said in court on behalf of the principal, even if prejudicial. Despite this formalism, means were soon found in practice to limit the mandate of an *avant parlier* and to introduce the possibility of the principal disavowing what had been said by him.<sup>46</sup> It is clear that the French *avocat* developed from the *avant parlier* (or *amparlier*) and, by 1274, the profession of *avocat* before the *Parlement* of Paris was being regulated.<sup>47</sup> In Brabant, the *avant-parlier* first appears in the fifteenth century and it has recently been argued that it was *avant-parlier*, rather than the procurator (*voorspreker*), who was the forerunner of the advocate (*taelman*).<sup>48</sup> By the end of the sixteenth century the terms *taelman* and *voorspreker* were synonymous, although originally the latter had merely appeared in place of the litigant, whereas the former had given technical and legal assistance to the litigant.<sup>49</sup> These examples should be contrasted with the Nordic countries where a legal profession developed much later and in a quite different way. In Sweden the *Hovrätt*, erected in 1614 in Stockholm, became the principal Court of Appeal and generally permitted legal representation before it.<sup>50</sup> On this basis a regulated legal profession was able to develop here and in other *Hovrätter*, (Courts of Appeal). The

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<sup>45</sup> *Ibid.*, introduction, xvi.

<sup>46</sup> Delachenal, *Histoire des Avocats*, introduction, viii.

<sup>47</sup> B. Auzary et S. Dauchy, 'L'assistance dans la résolution des conflits au civil devant le Parlement de Paris au Moyen Age', 14; Shennan, J.H., *The Parlement of Paris*, (London, 1968), 48.

<sup>48</sup> Rousseaux, 'L'assistance dans la résolution des conflits en Brabant'. (15<sup>e</sup> - 18<sup>e</sup> siècle), II-9. Henceforth, Rousseaux, 'Brabant'.

<sup>49</sup> Rousseaux, 'Brabant', II-7.

<sup>50</sup> The historical background to the court is discussed in Michael Roberts, *Gustavus Adolphus: A History of Sweden 1611-1632*, (London, 1953), 266ff.

interesting point about this is the terminology, since the advocates developed in the seventeenth century out of a body of representatives who initially were called 'procurators'.<sup>51</sup>

Scotland falls somewhere in between these two examples. There was certainly a progression in terminology from 'forespeaker' and 'procurator' to 'advocate'. There was also a clear distinction between those terms. But whichever of these terms was applied to him, the central function of the man of law was to plead on behalf of his client in court. In seeking a functional division similar to that in England between serjeants-at-law and attorneys, it is necessary to look at the distinction between advocates and writers - two groups which had been distinct members of the College of Justice from its inception - which became increasingly pronounced in the later sixteenth century. But even this differentiation should not be pushed too far. At the end of the century the advocates and the writers to the signet, who had many interests in common and whose numbers were similar, even contemplated becoming one incorporation.<sup>52</sup> In 1565, the tax roll of Edinburgh (which for once included men of law) reveals that there was no great social distinction between the writers and the advocates, nor was there necessarily a great difference in their respective incomes although it suggests that the leading advocates were earning more than the busier

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<sup>51</sup> P. Letto-Vanamo, K.A. Modéer, D. Tamm, 'The Nordic Countries', Société Jean Bodin, Congrès de Copenhague (1993), 7. It is worth pointing out that in Namur, the words '*avocat*' and '*procureur*' appear to have been used interchangeably before the court: Vael, Claude Vael, 'L'assistance judiciaire dans le Pays-Bas méridionaux 3. Avocats et procureurs au Conseil provincial de Namur du Xv<sup>e</sup> au XVIII<sup>e</sup> siècle', Société Jean Bodin, Congrès de Copenhague (1993), 3-9. Henceforth, Vael, 'Conseil provincial de Namur'.

<sup>52</sup> Hannay, *College of Justice*, 316; in 1586 there were about fifty advocates and forty writers to the signet: (S.R.O.), Professor Hannay's Papers, G.D. 214/14, quoting B.S. III, 354.

writers.<sup>53</sup> This contrasts sharply with practice on the continent where the offices of *avocat* and *procureur* were kept quite distinct. At Malines, for example, legislation ensured that the same man could not perform both of these functions simultaneously.<sup>54</sup> By the early 1500s in Brabant *avocats* were distinguished from *procureurs* by the fact that they alone were graduates.<sup>55</sup> Such a clear distinction as that at Brabant was never made in Scotland. Even in the seventeenth century, the contrast between the educational standards of both branches of the profession should not be exaggerated and many writers were graduates when, in fact, this was not a formal requirement.<sup>56</sup> The way in which the functional division arose in Scotland between advocates and writers, and the process by which it widened during the course of the seventeenth century and beyond, has not yet been properly investigated. By the time both aspects of the profession had developed fully, in the nineteenth century, Lord Cockburn was able to contrast sharply the individualism of the advocates with the ‘pure corporation spirit’ of the writers to the signet.<sup>57</sup>

But, as the following chapters will make clear, it would be a mistake to view advocates in the sixteenth century as, in any sense, isolated figures. Most directly, although they tend to appear on their own in court, as the sixteenth century progresses more becomes known of their servants and apprentices. For instance, a servant of Thomas McCalzeane was paid a small fee in 1564 by the town of Edinburgh for

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<sup>53</sup> E.g. *Edinburgh Records: The Burgh Accounts*, (ed.) R. Adam, (Edinburgh, 1899), 57-8 [henceforth ‘*Edin. Accs.*’], where the writers John Young and William Paterson were assessed at £40 and £20 respectively, whereas the advocates Alexander Sym and Clement Littil were assessed at £40 and £60.

<sup>54</sup> Van Rhee, *Great Council of Malines*, 94.

<sup>55</sup> Rousseaux, ‘Brabant’, II-17.

<sup>56</sup> J.W. Cairns, ‘Netherlands’ Influences on Scots Law and Lawyers’, in *Scotland and the Low Countries*, (ed.) G.G. Simpson, (East Lothian, 1996), 141.

<sup>57</sup> Henry Cockburn, *Memorials of his Time*, 419; (quoted by Simpson, ‘Advocates’, 176).

copying 'ane wryting...that was aganis the toun'.<sup>58</sup> To take a further example from the same period, the notary James McCartney was described in 1563 as the servitor of the advocate, and clerk register, James McGill of Nether Rankeillor.<sup>59</sup> It is difficult to see much difference in the social status of master and servant in this case. As a notary, McCartney appears in his own right in the Edinburgh tax roll of 1565 assessed at the relatively high figure of twenty pounds.<sup>60</sup> Nor was he without social connections. His wife, Marion Hamilton, was the daughter of the macer Thomas Hamilton of Priestfield and the granddaughter of the advocate Robert Leslie. This made McCartney the uncle to Thomas Hamilton, lord advocate and first earl of Haddington, better known as 'Tam o' the Cowgait'.<sup>61</sup> He was also, like McGill, a leading Protestant and indeed was appointed solicitor to the church of Scotland in 1564.<sup>62</sup> McGill remembered McCartney in his will in 1579, leaving him £54 6s.<sup>63</sup> It would be wrong to suggest that had McGill not been clerk register, then a man like McCartney would not have been his servant. The names of other advocates' servants are known and often these servants bore the same surname as other practising advocates, indicating that, at least in some cases, they may have been apprentices. For example, in 1561 James McGill, possibly the son of James McGill of Nether Rankeillor, was

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<sup>58</sup> *Edin. Accs.*, 460. Cf. also, John Ochiltree and John Heriot, servants of Master David McGill, *Prot. Bk. King*, no. 123: 12 June, 1556; Robert Cathcart, servant of Master David McGill, *Laing Chrs.*, no. 927: 6 November, 1575; Thomas Horneuar and James Melville, servants of Master John Spens, *Laing Chrs.*, no. 662: 24 November, 1556. Writers also had servants, e.g. George Gibson, 'scryb of consale', had a servant named Andrew Gray: *Laing Chrs.*, no. 757: 10 April, 1563.

<sup>59</sup> *Prot. Bk. Grote*, no. 242: 8 Nov., 1563.

<sup>60</sup> Lynch, *Edinburgh and the Reformation*, 377.

<sup>61</sup> *House of Hamilton*, 413.

<sup>62</sup> D. Shaw, *The General Assemblies of the Church of Scotland 1560-1600, Their Origins and Development*, (Edinburgh, 1964), 154. Henceforth, 'D. Shaw, *General Assemblies*'.

<sup>63</sup> C.C.8/8/11 fol. 150v.: 15 October, 1579.

the servant of the advocate Alexander Sym.<sup>64</sup> John McCalzeane on at least two occasions was recorded as the servant of Master John Shairp.<sup>65</sup> McCalzeane, a notary, probably belonged to the same family as was the leading advocate and lord of session Thomas McCalzeane, even though he was not his son.<sup>66</sup> The same could well be said of Henry McCalzeane, another advocate.<sup>67</sup> Although Thomas McCalzeane died without a male heir, in 1570 his daughter Eufame married Patrick Moscrop, from another Edinburgh legal family, who took his wife's surname.<sup>68</sup> Patrick, the son of the advocate John Moscrop, a long standing friend of his better known contemporary Clement Litill, was perhaps also the nephew of the notary Adam Moscrop.<sup>69</sup> References such as these indicate that in terms of social status, it would be wrong to draw too sharp a distinction between advocates, on the one hand, and writers and notaries on the other. It is true that, as a group, the advocates were probably wealthier than writers and notaries and the Edinburgh tax roll of 1565 (which includes both groups) goes some way towards demonstrating this. But they often belonged to - or had married into - the same families and, as will be shown below in chapter three, the idea of the 'legal family' belongs as firmly in the sixteenth century, and even the fifteenth (although the source material is less plentiful), as in the seventeenth.

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<sup>64</sup> *Prot. Bk. Grote*, no. 202: 24 November, 1561. James McGill did have a son called James; see, for example, the marriage contract of 1576 between McGill senior and Robert Stewart of Rosyth: (S.R.O.) G.D. 11/65 (Bruce of Kennet): 9 May, 1576.

<sup>65</sup> *R.M.S.*, v, no. 846: 20 July, 1585; and, along with James Donaldson as servant of Master Alexander Skene; Fraser, *Montgomeries*, II, 222-3: 10 April, 1582.

<sup>66</sup> For his status as a notary public, see *R.S.S.*, v, no. 611: 24 October, 1583.

<sup>67</sup> For Henry, see, for example, *R.M.S.*, v, no. 163: 11 April, 1581; *R.S.S.*, viii, no. 212: 28 May, 1584. He was also a justice depute: Pitcairn, *Criminal Trials*, I, ii, 98. They were also probably related to the mid-century notary James McCalzeane, for whom see, for example: (S.R.O.) G.D. 12/119 (Swinton Charters): 5 April, 1544.

<sup>68</sup> Lynch, *Edinburgh and the Reformation*, 340.

<sup>69</sup> On John Moscrop see Lynch, *Edinburgh and the Reformation*, 344 and Finlayson, *Clement Litill and his Library*, 6-7; for Adam, see *Prot. Bk. King*, nos. 20, 55, 145: 27 July and 4 November, 1555; 4 August, 1556. Although these references indicate activity in Edinburgh, Adam, a notary by apostolic authority, was a priest of Glasgow diocese: (S.R.O.) G.D. 6/612 (Biel Muniments): 11 September, 1554.



By the 1580s specific reference to apprenticeship can be found in the books of sederunt.<sup>70</sup> In December, 1580, John and David McGill, sons of the late James McGill of Nether Rankeillor, returned from studying in France and were admitted as advocates, having given ‘specimen doctrine’, but they were not to act ‘without thair haif ane auld procuratour and advocat adjonit to thaim’.<sup>71</sup> The same happened, less than a month later, with John Moncreiff, a graduate of St Andrews and Poitiers.<sup>72</sup> Moncreiff was to appear with an experienced advocate until the lords were satisfied he was competent to act by himself. These cases are not unique nor are they the first evidence of an effort by the judges to put entrants through a period of probation.<sup>73</sup> It represents the clearest indication of learning by practice and observation, although there is little doubt that such learning was by then traditional. At least some who are recorded as ‘servants’ to advocates were probably aspiring advocates themselves, and although references to such servants are extremely rare prior to 1550, the basic method of learning their native law cannot have differed greatly.

### **‘Advocates’ in Scotland**

In the past there has been a misreading of the original legislation by which the College of Justice and its procedures were formally established. Lord Clyde, a judge with a great interest in history, determined, in a case decided in 1924, that in the original legislation the chapter which permitted only procurators to enter the council chamber

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<sup>70</sup> Cf. Brabant, where practical knowledge of procedure was, from 1501, a necessary requirement for admission as a *procureur* for those without a university degree; this involved a period of six or seven years functioning as a clerk to a *procureur*: Brabant, II-17.

<sup>71</sup> (S.R.O.) G.D. 214/14 (Professor Hannay’s Papers), quoting B.S., iii, 137 (now C.S. 1/3/1 fol. 137r: 20 December, 1580). See also Hannay, *College of Justice*, 142.

<sup>72</sup> C.S. 1/3/1 fols., 138r-v: 11 January, 1581.

<sup>73</sup> See the case of John Moscrop described in chapter seven.



with their clients was intended to refer to the 'advocates' whose office was instituted in 1532.<sup>74</sup> The assumption here seems to be that the procurators and the advocates were the same thing. The general tenor of the legislation suggests that this was the case, with the phrase 'general procurators or advocates' being used, although no effort was made to distinguish a general procurator from any other kind of procurator.<sup>75</sup> On the other hand, the historian Nan Wilson suggested that by the 1532 Act the designation 'advocate' should be applied only to those procurators who had qualified to plead before the College of Justice. In this view, advocates were superior to procurators (although not necessarily superior to 'general procurators').<sup>76</sup> Wilson's view is interesting, and may well be correct, but it cannot be founded on the legislation as she suggests since nowhere in the Act was there an attempt to restrict the meaning of the word 'advocate' in this way.<sup>77</sup> The difficulty with Lord Clyde's view is that his argument - which is still good law - must now be seen as poor history. The original advocates named to act before the College of Justice did not have an exclusive right of audience. As will be shown in chapter four, they had no monopoly on business before the court. The weakness of Wilson's view lies in the fact that not only was the word 'advocate' used prior to 1532, but no evidence emerges until a considerable time after that date of men using the designation 'advocate' as a regular description of their status. That the word 'advocate' came to mean a man with the

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<sup>74</sup> *Gordon v Nokenski-Cumming*, 1924 S.C. 939 at 941; 1924 S.L.T. 140 at 141. As well as editing Craig's *Jus Feudale* in 1934, Lord Clyde edited several other works and contributed several articles to Stair Society publications.

<sup>75</sup> The legislation is quoted at the beginning of chapter three.

<sup>76</sup> Wilson, 'Faculty of Advocates', 235.

<sup>77</sup> On 12 November, 1556, there is a reference to 'the haille advocattis & procuratouris' who swore to uphold the statutes of session and to 'lelelie & trewlle procure for thir clientis'. This is consistent with Wilson's view, although it is still rather ambiguous: C.S. 6/29 fol. 33v.

right to plead in the College of Justice is quite true; but that it first had that meaning in 1532 is, at best, doubtful.

What appears to have happened is that the word advocate attached particularly to the king's advocate from early in the reign of James IV.<sup>78</sup> A good example of this attachment can be found in 1505 when James Henryson, the king's advocate, acted on behalf of Mariota Calder and the earl of Angus, as, as the clerk wrote, 'thir ~~advocate~~ procuratour'.<sup>79</sup> By bothering to correct himself, the scribe was surely indicating that the word 'advocate' should be reserved for when Henryson acted on the king's behalf, even if functionally the task he was performing was the same. Even so, other scribes were less fastidious and the term was never exclusively used to refer to the king's man of law. As early as June, 1478, the word 'advocate' was being used instead of the word 'procurator' in reference to the representative of ordinary litigants.<sup>80</sup> References to 'advocates' before the lords of council can also be found during the reign of James IV.<sup>81</sup> In an obligation which survives from 1509, Adam Otterburn promised to 'be advocat and procurator' for Robert, lord Erskine.<sup>82</sup> Clearly the words procurator and advocate were synonyms and pre-supposed the provision of an identical service. With the development of the role of the queen's advocate during the minority of James V, usage of the term widened although it was connected primarily with royal service. By the early 1520s James Beaton, Archbishop of Glasgow, was also using his own 'advocate', Master James Simson. Simson, a churchman who was soon destined to

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<sup>78</sup> See chapter seven.

<sup>79</sup> C.S. 5/17 fol. 112v: 12 December, 1505.

<sup>80</sup> (S.R.O.), Protocol Book of James Darow, B66/1/1/1, fol. 209: 16 June, 1478. Henceforth, '*Prot. Bk. Darow*'.

<sup>81</sup> E.g., *A.D.C. (Stair)*, nos. 426, 627.

<sup>82</sup> (S.R.O.) G.D. 124/7/10 (Ailsa Muniments): 7 July, 1509.

hold the office of official of St Andrews, appeared on Beaton's behalf on five occasions between 8 December, 1522, and 26 February, 1524.<sup>83</sup> This follows a significant gap in the record, although at least once in 1518 Simson had acted as 'advocate' for Beaton and it is likely that he continued to do so from then until 1524.<sup>84</sup> In the course of these six appearances in the record, Simson was described as 'advocate' five times, and as Beaton's 'procurator' only four times (on some days he was described in more than one way). His appearances under the title of 'advocate' cannot be put down to scribal error, and it seems likely that the unconventional usage was applied because of Beaton's position as chancellor and thus president of the court. There is no evidence of Beaton appearing by his 'advocate' following his loss of the chancellorship. The leading men of law Thomas Kincraigie, Thomas Marjoribankis and Abraham Crichton all acted for him when he was archbishop of St Andrews but, whenever any of them appeared, they were recorded as his procurators.<sup>85</sup> Simson's role may therefore represent a further, albeit modest, widening of the regular use of the term although Beaton's successors as chancellor did not use their own 'advocate'.<sup>86</sup> As time went on the term 'advocate' was also used in relation to the representatives of litigants of lesser rank. There was no regularity about this usage, and it may be explicable simply on the basis of scribal laxity. For example, in 1515 Adam Otterburn was described as advocate for Alexander and Robert Barton. The day before, he had appeared as Alexander's procurator, with Robert in attendance as

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<sup>83</sup> C.S. 5/33 fols. 101v, 107v-109r, 154r; C.S. 5/34 fol. 118v. Simson was official of St Andrews in 1525 and later was official of Lothian: Watt, *Fasti*, 324, 326.

<sup>84</sup> C.S. 5/32 fol. 6v: 19 March, 1518.

<sup>85</sup> E.g., (Crichton): C.S. 5/43 fol. 28r, C.S. 6/1 fols. 117v, 119v; C.S. 6/2 fol. 1v, 4v; (Kincraigie): C.S. 5/40 fol. 162v; (Marjoribankis): C.S. 6/2 fol. 16v. Beaton was translated from Glasgow to St Andrews in 1522: J. Dowden, *The Bishops of Scotland*, (Glasgow, 1912), 40.

<sup>86</sup> Beaton vacated office in 1526, to be replaced briefly by the earl of Angus and then, for the remainder of the reign, by Gavin Dunbar: *Handbook of British Chronology*, (3rd Edition), 183.

Alexander's tutor.<sup>87</sup> In a deed drawn up and registered for execution before the lords of council in December, 1526, Henry Spittall was described as advocate for Alexander, lord Elphinstone.<sup>88</sup> In March, 1530, James Foulis acted as the 'advocat' of William Anderson.<sup>89</sup> Prior to these may be found at least two references to 'advocates' as a group. The first of these occurred in 1522, when there is reference to a meeting of 'certane advocatis & men of law' with the official of Lothian to advise him concerning a case that had been appealed.<sup>90</sup> Then in March, 1524, John Brown, in naming several procurators to act on his behalf before the lords, referred to 'the Remanent (remaining) advocates'.<sup>91</sup> References such as these indicate that the term advocate was beginning to enjoy wider currency even though at this stage the term was still not in general use as a standard designation.

As to the precise meaning of 'advocate' in Scots usage, it is clear that the personal presence of the king, or the queen mother, had no effect on the title accorded to his or her legal representative. There are clear cases when Margaret Tudor was recorded as personally present before the lords when her advocate was acting on her behalf and the same is true of the king and the chancellor.<sup>92</sup> This suggests that the term 'advocate' as it was used in Scotland was a hybrid. It covered both appearing in the absence of another, and speaking on behalf of a litigant who happened to be present. This wider meaning could distinguish the verb 'to advocate' from the verb 'to

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<sup>87</sup> C.S. 5/27 fol. 102v, 107v: 22 and 23 November, 1515.

<sup>88</sup> C.S. 5/36 fol. 145r: 15 December, 1526.

<sup>89</sup> C.S. 5/41 fol. 14r: 17 March, 1530. These examples are not exhaustive.

<sup>90</sup> C.S. 5/33 fol. 93r: 15 December, 1522.

<sup>91</sup> C.S. 5/34 fol. 154v: 19 March, 1524. For further comment, see chapter four.

<sup>92</sup> E.g., C.S. 5/30 fol. 194v; C.S. 5/32 fol. 187v.

procure', assuming that there was a difference (which is by no means certain).<sup>93</sup> Alternatively, the verb 'to advocate' might simply mean 'to speak on behalf of' since there was no verb form of the noun 'forespeaker'. 'Advocation', as it was called, may conceivably have been more to do with putting forward a forensic argument rather than simply making appearance on another's behalf. For example, in 1513, the clerk described the experienced man of law Master Walter Laing as '~~procurator~~ advocat' for the Laird of Touch, having initially described him as his forespeaker.<sup>94</sup> Too much should not be read into this error. However for some reason the clerk was unwilling to leave Laing, acting as forespeaker, designed as procurator. Instead he settled for the word 'advocate' and it may be that he considered this a synonym or, as suggested above, a hybrid.

Unfortunately Sir John Skene saw no need to include the terms 'advocate' or 'procurator' in his treatise *De Verborum Significatione* in 1597, since his purpose was only to define the difficult words which appeared in the treatise *Regiam Majestatem*. The clerks of the council who used these words knew what they meant and saw no need to define them. It is therefore impossible to be certain of the precise significance of the terms as they were used during the minority of James V. However, it seems unlikely that an 'advocate', in purely functional terms, was performing a task that differed substantially in kind from that carried out by either a procurator or a forespeaker: they made the same arguments and raised the same objections. There is

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<sup>93</sup> The verb 'to procure' is quite commonly found and meant simply 'to act as a procurator': e.g. C.S. 5/28 fols. 110r, 140v.

<sup>94</sup> C.S. 5/25 fol.s 124r-125r: 24 Mat, 1513.

little evidence to suggest that advocates were viewed as more important, or more permanent, office holders than procurators.

It seems to have been the case that during the reign of James IV, and more particularly that of James V, the word 'advocate' was growing in popularity. Primarily used in connection with only a small number of very important litigants, especially the king, it came to be used even before 1532 to describe collectively the leading men of law in the kingdom. This development was replicated the following century in the Nordic countries and may perhaps be explained by reference to Romano-canonical procedure. Since in church courts in other jurisdictions advocates enjoyed higher status than procurators, it may have been the case that in Scotland, particularly in the years following 1532, men of law took that higher title for themselves. As the century progressed the word 'advocate' enjoyed increasingly wide currency and began to be used as a regular designation in a way in which hitherto it had not. The clerks employed to make entries in the registers of the great seal or the privy seal, by the minority of Queen Mary, began to describe men such as David Borthwick or Thomas McCalzeane as '*advocatus*'.<sup>95</sup> The same is true of notaries such as Alexander King, Nicol Thounis and Gilbert Grote, whose protocol books in the 1550s and 1560s record the status of those advocates who bore witness to instruments they recorded.<sup>96</sup> Even though it was not until Mary's minority that a significant number of lawyers are regularly found designed by the term 'advocate', it was the development of the College of Justice, allied to their own sense of corporate spirit and their own self-

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<sup>95</sup> E.g., *R.S.S.*, iv, no. 758: 5 June, 1550; *R.M.S.*, iv, no. 725: 3 December, 1552.

<sup>96</sup> E.g. 'Master John Moscrop advocate' in *Prot. Bk. King*, no. 211: 13 February, 1557; 'Master John Abircrummy advocate' in *Prot. Bk. Thounis*, no. 96: 17 August, 1562; 'Master Alexander Sym advocate' in *Prot. Bk. Grote*, no. 202: 24 November, 1561.

image as men of rank which may explain the increasing popularity of a term which in the fifteenth century was predominately used only by legislators and poets.<sup>97</sup> But the fundamental conclusion must be that the same man, in the same place and performing substantially the same task, might be called either *advocate*, *procurator* or *forespeaker* depending merely upon the presence or status of his client. As has already been demonstrated, practice was not always consistent. The same person, in relation to the same client on the same day might appear by more than one title. For example James Simson, in 1523 appeared on one occasion as ‘procuratour & forspeker’ for Sir Thomas Boswell and Henry Spittall did so in respect of Robert Scott six years later.<sup>98</sup>

The other main term used to describe men of law, albeit in specific circumstances, was *assessor*. Normally the context was one in which they were called upon to advise laymen, such as justiciars, operating in a judicial or administrative capacity, of the legal implications involved in the pursuit of their function. The most obvious example is that of the burgh council although the *assessors* even of the major burgh at this period, Edinburgh, have been described as ‘shadowy figures’.<sup>99</sup> More will be said about them in the next chapter, although it is interesting to note that, as with most of the terms in the present discussion, the designation *assessor* continued in use in connection with the burgh council for a considerable period. In the mid-seventeenth century lawyers were still acting as assessors to Edinburgh town council; by then men

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<sup>97</sup> Several fifteenth century Acts of Parliament used the word ‘advocate’, such as the acts of James I anent advocates for the poor and the oath of calumny. The latter was mentioned above and the former is discussed in chapter four below. As for the poets, see *infra*.

<sup>98</sup> C.S. 5/33 fol. 179v: 12 February, 1523; C.S. 5/40 fol. 92r: 11 August, 1529. These should be distinguished from entries such as ‘Robert Galbraith procuratour and forspekar for Robert Fogo and Patrick Barcar’ since, clearly, Fogo may have been absent and Barcar present: C.S. 5/39 fol. 113v: 25 February, 1529.

<sup>99</sup> Lynch, *Edinburgh and the Reformation*, (Edinburgh, 1981), 15.



with surnames recognisable in legal practice today, such as Wedderburn and Burnett, appeared in that capacity; as did, in 1658, the noted advocate George Lockhart of Carnwath.<sup>100</sup> In the 1490s *domini assessores* had acted to assist the justiciar, who was usually a nobleman, by advising him on points of law and procedure.<sup>101</sup> Admirals, again laymen, also had lawyers acting as *assessors*. In 1544 the admiral, Patrick, Earl Bothwell, desired and was given by parliament an impressive array of leading judges and men of law, James Foulis, Thomas Bellenden, Henry Lauder, Hugh Rigg and Thomas Marjoribankis, as his *assessors* to help him decide a case brought by merchants of 'Sprewisland' (perhaps the Baltic port of Stralsund) involving the spuilzie of a ship by Scotsmen.<sup>102</sup> At a lower level there is evidence that sheriff deputies, at least on some occasions, also made use of men of law acting as their *assessors* although this would appear to have been the exception rather than the rule. In 1505, the service of a breve in favour of George Rule by James Aldintrau, 'pretendit' sheriff depute of Berwick, was annulled on the basis that James had not been properly sworn and that he had 'requirit the said george roullis advocate to sit as assessour with him and to geve him counsale in the said mater'.<sup>103</sup> The lands to which George was unjustly served were lands held in the barony of Bonkle in Berwickshire and the action of the superior, George, Master of Angus, to annul the retour was therefore successful. As a contrast with this case, Sir Alexander Lindsay petitioned the lords of council in 1512 to appoint *assessors* to advise the sheriffs chosen to serve his 'brevis' (presumably, brieves of succession or inquest) of the earldom of Crawford, in

<sup>100</sup> *Edin. Burgh Recs.*, vol. 10 (1655-1665), 108: 23 July, 1658.

<sup>101</sup> Hannay, *College of Justice*, 328.

<sup>102</sup> *A.P.S.*, ii, 450: 12 December, 1544.

<sup>103</sup> C.S. 5/17 fol. 155r: 19 December, 1505.



order to ensure that justice was 'equalie ministrat'.<sup>104</sup> Clearly, the use of *assessors* could either improve the quality of justice or reduce it, depending upon the circumstances and, in particular, the identity of the *assessors* in question.

### **Perception: The literary sources**

'If you should become a lawyer, I'd hang you on the gallows.'

Martin Luther<sup>105</sup>

Throughout Europe in the later medieval period, and indeed earlier, lawyers were one of the prime targets of literary and satirical abuse. The sin of greed was attributed to them - in England from at least the early twelfth century<sup>106</sup> - and this in turn earned them a number of epithets such as 'tongue-renter', 'greed-bag' and, very commonly, 'vulture'.<sup>107</sup> Criticism of men of law was sometimes associated with anti-clericalism but although the church courts were often targeted by satirists it is arguable that this merely reflects the fact that Romano-canonical procedure was more complex than secular procedures and that its practice required increased specialisation from an early date.<sup>108</sup> With increasing complexity and specialisation in secular legal practice, such as occurred in Scotland in the fifteenth and sixteenth centuries, criticism of men of law was less inclined to distinguish between layman and ecclesiastic. More and more it came to be based on the simple fact that ordinary people were 'at the mercy of a

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<sup>104</sup> C.S. 5/26 fol. 10v: 26 October, 1512.

<sup>105</sup> Martin Luther to his son. Quoted by Willam J. Bouwsma 'Lawyers and Early Modern Culture', 78, (1973), *American Historical Review*, 316. Henceforth 'Bouwsma 'Lawyers and Early Modern Culture'.

<sup>106</sup> Brundage, 'Advocate's Profession', 439, n. 29. In Scotland the term 'gegar' (trickster) was on occasion applied to men of law even in court: C.S. 5/26 60r.

<sup>107</sup> Brundage, 'Advocate's Profession', 444.

<sup>108</sup> On the link with anti-clericalism see D.Gray, *Robert Henryson* (Leiden, 1979), 146. Henceforth 'Gray, *Henryson*'.

class of trained and educated specialists [able to] take full advantage of their superior equipment in a highly technical field.'<sup>109</sup> A reflection of this may be seen from the fact that all lawyers were banned from More's Utopia because of their ability to 'cleverly manipulate cases and cunningly argue legal points.'<sup>110</sup>

But even the briefest of surveys of the Scottish literature of the period should be prefaced by one caveat: it is foolhardy to draw too many conclusions about the true state of society from the constructs of late medieval literary figures.<sup>111</sup> Nonetheless such a survey is valuable in helping to identify, albeit using broad themes, views about lawyers and the law in general which the poets and playwrights of the time felt would strike a chord with their audience. At a fundamental level these views are based on traditional stereotypes, in some instances dating back to ancient Rome, but to have some measure of contemporary resonance it is fair to suggest that they also had to be relevant to the particular world of Scottish legal practice.<sup>112</sup>

The *Moral Fabillis* of Robert Henryson (c.1420-c.1490) represent the traditional cross-roads of law and morality in the literary world: a view of social reality analysed

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<sup>109</sup> G.R. Owst, *Literature and Pulpit in Medieval England* (Cambridge, 1933), 341. The same might be argued in relation to the tradition of attacking medical practitioners for their greed and incompetence. John of Salisbury's complaint: 'They speak euphorisms on every subject and make their hearers stare at their long, unknown and high sounding words' might as easily have been directed at men of law rather than medical men. See I.W.A. Jamieson *The Poetry of Robert Henryson: A Study of the Use of Source Material*, (Unpublished Ph.D. Thesis, University of Edinburgh, 1965), 301-313. Henceforth Jamieson, *Poetry of Henryson*.

<sup>110</sup> As quoted by Bousma, 'Lawyers and Early Modern Culture', at note 33.

<sup>111</sup> See, for example, R.J. Lyall, 'Complaint, Satire and Invective in Middle Scots Literature' in N. Macdougall (ed.) *Church, Politics and Society: Scotland 1408-1929*, 44 (henceforth Lyall 'Complaint'), and Gray, *Henryson*, 151-2.

<sup>112</sup> It is worth quoting Jamieson's comment, in relation to Robert Henryson, that 'he is not describing specifically Scottish problems, though of course he does refer to the problem under the guise of contemporary reference (using technical terms for instance) to make his points more relevant to his immediate audience': Jamieson, *Poetry of Henryson*, 115.

through the filter of a poetic form particularly apt for the purpose and directed as a vehicle for social comment and protest.<sup>113</sup> Like all competent satirists Henryson knew of what he spoke as is best exemplified in his well known poem *The Sheep and the Dog* which in Ollivant's view demonstrates that the author had some understanding of the operation of the church courts.<sup>114</sup> This is hardly surprising if Henryson had studied and even taught law at university as has been suggested.<sup>115</sup>

The story is simple enough and by no means original. A dog wrongfully accuses a sheep of failing to pay for a piece of bread; the case is heard in the consistory court before the judge, a wolf, the 'impartial' head of an 'impartial' court. The sheep, handling his own defence, in the end is forced to sell the wool on his back to pay off the non-existent debt.<sup>116</sup> In the stanza which follows the men of law are introduced:

'The foxe was clerk and noter in the cause;  
The gled, the graip up at the bar couth stand,  
As advocatis expert in to the lawis,  
The doggis pley togidder tuke on hand,  
Quhilk wer confidderit straitlie in ane band  
Aganis the scheip to procure the sentence;  
Thocht it wes fals, thay had na conscience.'<sup>117</sup>

<sup>113</sup> R.J. Lyall, 'Politics and Poetry In Fifteenth and Sixteenth Century Scotland', 3(2), (1976), *Scottish Literary Journal*, 5 at 7 recognises that Henryson 'stands clearly within a medieval tradition of social protest.' Henceforth Lyall, 'Politics'. The editions of Henryson and Dunbar used here are the most recent: Denton Fox (ed.), *Robert Henryson: The Poems* (Oxford, 1981) and W.M. Mackenzie (ed.), *The Poems of William Dunbar*, (Edinburgh, 1932). Line references are to these editions.

<sup>114</sup> S. Ollivant, *The Court of the Official in Pre-Reformation Scotland*, (Stair Society; Edinburgh, 1982) 171. [Henceforth, Ollivant, *The Court of the Official*']. Although it is clear that complete accuracy is forfeited in the interests of poetic licence.

<sup>115</sup> J. MacQueen, *Robert Henryson*, (Oxford, 1967), 20, and his chapter in *The History of Scottish Literature*, (ed.) R.D.S. Jack, (Aberdeen, 1988), 64-5.

<sup>116</sup> For discussion of this poem see Ollivant, *The Court of the Official*, Appendix 1; and R.W.M. Fulton, *Social Criticism*, chapter 3.

<sup>117</sup> Lines 1174-1180. The 'gled' was a kite; the 'graip' was a vulture.

Immediately of interest is the imagery of the sheep being shorn, albeit indirectly, by the legal process. The sheep has no man of law, as Rowlands suggests perhaps because there was no one connected to the court whom he could trust, and it is the advocates who help his opponent to present and win his unjust cause.<sup>118</sup> They do so because, as a kite and a vulture, they 'had na conscience'.

With direct reference to the 'consistory' (in line 1149) the narrative is clearly aimed at the church courts; however the *moralitas* refers to the sheriff court. In Lord Hailes' view Henryson 'probably stood more in awe of the court spiritual than of the temporal' and for that reason was more prepared to criticise the latter openly.<sup>119</sup> But the criticism of the spiritual court is obvious enough from the fable and I would agree with Fulton that the true intention was to criticise both the spiritual and the temporal courts.<sup>120</sup> The poet's characterisation of men of law, therefore, may be taken as having applicability wherever they practised.<sup>121</sup>

In the poem the sheep is outnumbered two to one with the dog's advocates agreeing together to pursue the claim in the knowledge that it was false. The sheep was summoned to appear within three days (l. 1165) and, on becoming aware of the summons, he did not even stop to eat as he hastened to court (l. 1169-70). In part this haste may explain why the 'seleie scheip' had no man of law but doubtless this was

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<sup>118</sup> Mary E. Rowlands, 'Robert Henryson and the Scottish Courts of Law', *Aberdeen University Review*, xxxix, (1961-2), 222.

<sup>119</sup> *Ancient Scottish Poems*, (ed.) D. Dalrymple, Lord Hailes (Edinburgh, 1770) 282, quoted by Jamieson, *Poetry of Henryson*, 102.

<sup>120</sup> Fulton, R.W.M., *Social Criticism*, 126.

<sup>121</sup> This is in line with the opinion of Mann in relation to Medieval English literature, specifically Chaucer and Langland. 'The outlines of the lawyer's stereotype remain the same whether he is judge or simple apprentice, ecclesiastical or civil lawyer': Jill Mann, *Chaucer and Medieval Estates Satire*, (Cambridge, 1973), 86, n.2.

the poet's purpose. In the event, the sheep handles his own defence and does so with some measure of skill.

'Off his awin heid, but aduocate, allone,  
Auysitlie gaif answer in the cace:  
'Heir I declyne the iuge, the tyme, the place.

This is my cause, in motiue and effect:  
The law sayis it is richt perrillous  
Till enter pley befoir ane iuge suspect,  
And ze, schir Volff, hes bene richt odious  
To me, for with zour tuskis rauenous  
Hes slane full mony kinnismen off myne;  
Thairfoir as iuge suspect I zow declyne

And schortlie, of this court ze memberis all,  
Baith assessouris, clerk and aduocate,  
To me and myne ar ennemies mortall  
And ay hes bene, as mony scheinheid wate...'

The sheep's pleadings show intelligence and knowledge of the law but it is doubtful whether too much can be read into this. Henryson may have been a university graduate and the workings of the courts were no great mystery to him nor, indeed, do they appear to have been to many of his contemporaries who were appearing, at least before the secular courts, without representation. But in the *moralitas* Henryson states that the sheep represents the 'pure commounis, that daylie ar opprest' (l. 1259). The poor, when they do appear in the records, do not do so without the benefit of representation and it is inconceivable that on their own they would have been capable of producing exceptions to the judge and the court in the way the sheep did. Elsewhere Henryson advises the poor man: 'Tyne nocht thy querrell in thy awin defence; this will not throu but grit coist and expence.'<sup>122</sup>

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<sup>122</sup> *The Fox, Wolf and Husbandman*, lines 2320-1.

We cannot, therefore, take the poet too literally, but in this, his most procedurally detailed legal satire, the men of law are seen as having no conscience and willing to cheat another on their client's behalf; it is clear that even where the poor man shows knowledge of the law such knowledge will not avail him. Fulton emphasises the obvious religious overtones in the poem: concentration on greed and worldly concerns, in the context of fallen humanity, in the poet's view reap dangerous rewards in the form of pestilence and plague.<sup>123</sup>

In *The Wolf and the Lamb*, a story which features another imaginary offence, a lamb is accused by a wolf of fouling the stream by drinking from it - even though the lamb was downstream from the wolf. The lamb appeals to the wolf to summon him to be heard before a court.<sup>124</sup> This request is denied by the wolf who simply resorts to execution without need of trial; after all, the implication is that the formal justice of the trial process will reap substantive injustice as it did in the story of *The Dog and the Sheep*. Men of law do not, in this case, contribute to an unjust result but in the *moralitas* Henryson still devotes attention to them in order to elaborate his meaning.

'Thre kynd of wolfis in this warld now rings:  
The first ar fals peruerteris of the lawis...

O man of law, let be thy subteltie,  
With nice gimpis and fraudis intricait,  
And think that God in his diuinitie  
The wrang, the richt, of all thy werkis wait.  
For prayer, price, for hie nor law estait,  
Of fals querrellis se thow mak na defence:  
Hald with the richt, hurt nocht thy conscience.'<sup>125</sup>

<sup>123</sup> Fulton, *Social Criticism*, 133-4.

<sup>124</sup> This particular request by the lamb appears to be original to Henryson and does not appear in any other version of the fable: Jamieson, *Poetry of Henryson*, 113.

<sup>125</sup> *The Wolf and the Lamb*, lines 2714-16; 2721-2727. A 'gimp' is a trifle; a subtle point.

As is his wont, the poet has made his message clear and, again, it is cast strongly with religious and moral overtones: the man of law, in defending the false with fine points and intricate arguments, perverts the law and betrays his own conscience (and his oath). This time the man of law is the wolf and God shall be his judge, ‘hellis fyre’ his reward. The sentiment is strongly expressed but it is precatory; it does not suggest lack of conscience on the part of the man of law, but rather that in fulfilling his function the lawyer should fear both God and his own conscience. For Henryson then, not all men of law were as oppressive and lacking in virtue as the kite and the vulture; but they would all share the same ultimate fate if they knowingly sustained false arguments. This is in line with the suggestion that Henryson’s *Fabillis* demonstrate his admiration for the law as an instrument of justice and his anger when the law is corrupted.<sup>126</sup>

The legal satire of William Dunbar gives an impression of lawyers and the courts hardly more favourable than that given by Henryson.<sup>127</sup> Of his works the most relevant here is *Tydings fra the Sessioun*. The poet speaks through a country-man just returned from town who is asked by his neighbour for gossip. In response he offers a general description of goings-on at the session, giving an impression of the vibrancy and bustle which existed there:

‘Sum bydand the law layis land in wed ;  
 Sum super expendit gois to his bed ;  
 Sum speidis, for he in court hes menis ;  
 Sum of parcialite complenis,  
 How feid and favour flemis discretioun ;

<sup>126</sup> Craig McDonald, ‘The Perversion of Law in Robert Henryson’s Fable of The Fox, The Wolf and The Husbandman’, *Medium Aevum*, xlix, 251.

<sup>127</sup> For a brief appraisal of Dunbar see Macdougall, *James IV*, 287-8 and Bawcutt, ‘William Dunbar and Gavin Douglas’, in *The History of Scottish Literature*, (Aberdeen, 1988), vol. 1, chapter 5.



Sum speikis full fair, and falsly fenis :  
Sic tythingis hard I at the Sessioun.

Sum castis summondis, and sum exceptis ;  
Sum standis besyd and skaild law keppis ;  
Sum is continuit, sum wynniss, sum tyniss...<sup>128</sup>

Once again the complex language of the law is used to good effect. Particularly interesting is the penultimate line quoted which suggests the presence of bystanders in court there to keep 'skaild' (scattered) law, presumably meaning to learn the 'practick'.<sup>129</sup> But in using the language of the law the poem is entirely in line with a body of earlier satirical writing and preaching which emphasised the mystery and technical complexity of the law and the consequent threat posed by those best placed to exploit it, the men of law.<sup>130</sup> This threat is illustrated with animal imagery with reference to the lamb and the fox.<sup>131</sup> Such figures, as we saw, were used by Henryson to similar effect: Dunbar uses them to reinforce his implicit suggestion of an air of danger and duplicity about the court-room. This serves to underline an earlier part of the poem which is more explicit in its view of those involved with the court:

'Is na man thair that trestis ane uthir ;  
Ane commoun doar of transgressioun  
Of innocent folkis prevenis a futher :  
Sic tydingis hard I at the Sessioun.'<sup>132</sup>

The meaning, which seems to be that those who transgress take precedence over the innocent however numerous they might be, suggests corruption and substantive

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<sup>128</sup> Lines 22-31.

<sup>129</sup> Dunbar's use of legal terminology is not restricted to this poem; for example, in *The Dance of the Sevin Deidly Synnis* he refers to heritage 'entert be breif of richt' (line 108).

<sup>130</sup> Bousma, 'Lawyers and Early Modern Culture', 317.

<sup>131</sup> 'Sum in ane lambskin is ane tod' (line 37).

<sup>132</sup> Lines 11-14.



injustice in an atmosphere tinged with mistrust. This is reinforced in the last stanza of Dunbar's poem *Of Discretioun in Taking*:

'Grit men for taking and oppressioun  
Ar sett full famous at the Sessioun,  
And peur takaris ar hangit hie,  
Schamit for evir and thair succession :  
In taking sowld discretioun be.'

The impression once again is that the law favours the rich at the expense of the poor although the reference to hanging should not be taken literally in reference to a purely civil jurisdiction.

It is difficult to assess the depth of experience and familiarity with the session held by either Dunbar or Henryson. Certainly Henryson indicates a relatively sophisticated knowledge of procedure and Dunbar, spending much of his time in Edinburgh, must have had first hand experience of the chaotic gathering which he depicted as the session. But the poet Gavin Douglas certainly had first hand experience of pleading before the session. As the brother of the earl of Angus and eventually as bishop of Dunkeld in his own right, Douglas had argued before the lords of session on behalf of himself and his family.<sup>133</sup> It was this experience that he drew upon when writing a passage in his poem *The Palice of Honour* in which the jurisdiction of Venus was rejected.<sup>134</sup> Although Douglas displays knowledge of legal terminology, his purpose was not satire and he does not venture any opinion of men of law.

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<sup>133</sup> P. Bawcutt, *Gavin Douglas*, (Edinburgh, 1976), chapter 1, *passim*.

<sup>134</sup> (Lines 692-702.): 'I me defend, Madame, pleis it zour grace.'  
'Say on', quod scho; than said I thus but mair:  
'Madame, ze may not sit in to this cace,  
For Ladyis may be Iudges in na place.  
And mairatour I am na seculair.

The arch satirist of James V's reign was of course Sir David Lindsay of the Mount. In his *Ane Satyre of the Thrie Estates*, the herald Diligence asks the pauper, left destitute by demands for mortuary fees following the deaths of his wife and his parents, why he does not go to Edinburgh for legal redress. The response is, perhaps, predictable:

'Sir I socht law thair this monie day;  
Bot I culd get nane at Sessioun nor Seinye;  
Thairfoir the mekill dum devill droun all the meinye'.<sup>135</sup>

But the overwhelming thrust of Lindsay's criticism is anti-clerical. As Diligence exclaims when the Pauper indicates he will persevere in the courts:

'Thou art the daftest fuill that ever I saw.  
Trows thou man, be the law to get remeid  
Of men of kirk? Na, nocht till thou be deid.'<sup>136</sup>

In the *Complaynt* Lindsay is critical of churchmen for: 'Baith gyding court and cessioun, Contrar to thare professioun.'<sup>137</sup> It is worth remembering that this was written just two years before the foundation of the College of Justice when eight of the original fifteen judges appointed were churchmen very much reflecting the make-up of the sederunts of the lords of council throughout the reigns of Lindsay's patrons. There seems no reason to believe that unease about clerical involvement in the

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A spirituall man - thocht I be void of lair -  
Clepit I am, and aucht my liues space  
To be remit till my Iudge ordinar.

I zow beseik, Madame, with bissie cure  
Till giue ane gracious Interlocutur  
On thir exceptionis now proponit lait'

<sup>135</sup> Lines 1966-68.

<sup>136</sup> Lines 2008-10.

<sup>137</sup> 'The Complaynt of Schir Dauid Lindsay', (1530), lines 317-8. Quoted by Carol Edington in *Court and Culture in Renaissance Scotland: Sir David Lindsay of the Mount, 1486-1555*, (University of Massachusetts Press, 1994), 154 and Appendix 1, 214. Henceforth 'Edington, *Lindsay*.'

administration of secular justice would stop at the judges. Of the original eight men of law named as general procurators in 1532 at least two could be described as clerics. Robert Galbraith was rector of Spott and held the post of treasurer of the Chapel Royal whilst John Lethame was subdean of Trinity collegiate church. Moreover Thomas Kincraigie held the post of procurator fiscal to Archbishop David Beaton, a post which primarily, although not exclusively, involved him in the representation of clerics and religious foundations although there is no evidence that Kincraigie himself was a beneficed cleric.<sup>138</sup>

Despite the difficulties in assessing the degree to which sentiments expressed in satirical writing merely reflected convention, and a broader European tradition with which the Scots were obviously familiar, it is clear that lawyers and the legal process in Scotland were no less targets of satire than they appear to have been elsewhere. The most remarkable thing about these works is that the word ‘advocate’ was used freely by these satirists at a time when its appearance in legal sources was extremely rare. This makes it tempting to suggest that poetry such as this had the effect of popularising the term.

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<sup>138</sup> Ollivant, *The Court of the Official*, 55-6.

## Chapter Two

### Lawyer and Client

Dealings between a litigant and his man of law in the sixteenth century, as today, were cloaked in secrecy. Towards the end of the century surviving correspondence between client and lawyer begins to cast considerable light upon the relationship but prior to the Reformation virtually nothing of this kind survives.<sup>1</sup> Instead it is necessary to fall back on a variety of less direct sources to understand the ways in which advocates were employed, the powers they had, and the relationships they had with their clients. These sources mainly reveal what went on in public; as to what happened behind the scenes, much must, as those privy to it always intended that it should, remain private and confidential.

#### Types of constitution

According to *Regiam Majestatem*, a litigant who wanted a man of law to act on his behalf before a judge had to appear personally in court and formally constitute one or more procurators to act for him.<sup>2</sup> This was apparently still the rule at the time of Balfour, although Skene, in his *Ane Short Form of Process* (1609), indicated that

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<sup>1</sup> The correspondence which has been published probably represents only a small proportion of all that survives. As well as direct letters to or from lawyers, such as those concerning the king's advocate Thomas Hamilton (to be found in Fraser, *Haddington*), or those in the Houston Muniments concerning Master John Shairp (for whom, see Sanderson, *Mary Stewart's People*, 22), numerous letters indirectly mention advocates and legal affairs e.g. a letter by Patrick Maxwell to his brother William, discussing a recent conference with John Shairp concerning family business: Fraser, *Maxwells*, II, 187: 11 June, 1597. A study of such correspondence would greatly add to our knowledge of late sixteenth century lawyers.

<sup>2</sup> Substantially the same text is found in *A.P.S.*, I, 94 and in the following manuscripts: National Library of Scotland (N.L.S.), Adv MS. 25.5.6 fol. 38r (1488); (N.L.S.) Adv. MS. 25.5.7 fol. 43r (c. 1475); Adv. MS. 25.5.9 fol. 35r (c. 1520).

personal presence was unnecessary so long as the procurator came to the bar of the court armed with authentic letters of procuratory from his client or with an extract from the books of council, subscribed by the clerk register, narrating his constitution. The source which Skene gives for this rule is a statute of the lords dated 13 June 1537. Unfortunately, the relevant portion of the record is missing and no entry survives for that date. Although it is surprising that Skene should have noted this rule when Balfour did not, Skene was the superior record scholar and ordinarily there would be no reason to doubt that he accurately quoted his source. Bisset, less reliable, follows Skene's account but gives as authority a statute of the lords dated 13 June, 1532.<sup>3</sup> No such statute appears in the existing record on that day and Bisset's dating for this period must be considered highly suspect. In the absence of the words actually used by the lords, it falls to assess Skene's interpretation against the evidence which does survive of contemporary practice.

This evidence consists in the main of formal constitutions of procurators written into the *acta* by the clerks of the council. As a source the major problem with these constitutions is that, whatever their original form, be it verbal or written, they were reduced in content to a core formula which was always used and rarely departed from. Several examples will demonstrate the limitations which these entries in the record involve for the historian. First, the most basic form of constitution:

‘Maister William bailze constitute maister thomas alane maister matho ker procuratouris for him in all materis’.<sup>4</sup>

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<sup>3</sup> Bisset, *Rolment of Courtis*, 162, c.8.

<sup>4</sup> C.S. 5/16 fol. 68v: 10 February 1505.

This was a general constitution by which William named Thomas and Matthew to represent him in all cases which might concern him before the lords of council. There are several clauses which might have been included in this constitution but were not. The ratification clause (*'et promisit de Rato'*) is the major absentee; it appears so regularly at the end of each entry that where it does not, the reason can usually be assigned to the forgetfulness of the scribe.<sup>5</sup> Another general constitution, closely contemporary to that already cited, is closer to the norm:

‘Schir alex[ander] brus constitute Edward brus david balfour of caraldstoun & Sir John elphinstoun proc[u]r[atou]ris for [him] in all actiounis *et promisit de Rato*’.<sup>6</sup>

Here Sir Alexander is noted as specifically having promised to ratify whatever his procurators might do on his behalf. This did not give them *carte blanche*; they had to act within the scope of the powers granted to them and, in the constitution quoted, none of the additional clauses which might be used to increase the procurator’s powers were included. These will be considered below.

The other basic type of constitution was the special constitution. By the use of such a constitution, the litigant nominated someone to represent him against a party or parties named in the constitution or in a specific action. A good, if unusually long-winded and descriptive, example occurred six months after the battle of Flodden:

‘Comperit Johnne makane of Ardmurchane & constitut colyne erle of ergyle procuratour [for] him *cum potestate substitutendi* anent the clame of ane silver pece being in the hands of gilbert murray burges of

<sup>5</sup> On the *ratum* clause in church practice, see Sayers, ‘Papal Judges Delegate’, 232. As she points out, the giving of a pledge comes from Roman law.

<sup>6</sup> C.S. 5/16 fol. 122r: 20 February 1505. Cf. ‘*in omnibus seu actionibus seu querelis motis aut movendis contra eosdem*’: 28 March, 1531: C.S. 5/42 fol. 148v.

Ed[inbu[r]gh and the sowme of viii<sup>xx</sup> merkis with certane uther jowell[is]  
being in ane box & tayne fra his servand in the feild of northumberland  
pertening to him as is allegit *et promisit de Rato*'.<sup>7</sup>

Although this mentions what the action concerns, it does not clearly identify the defender or defenders (although one of them, at least, was probably Gilbert Murray). In rare cases there was no defender, or at least, none who was identifiable at the time the constitution was made. For example, the bailies of Haddington named procurators 'to heir and se[e] certane lettres be transumit befor the lordis of counsale'.<sup>8</sup> The normal procedure involved in the transumption of deeds was for a notice to be posted on the tolbooth door advertising the date on which the transumption was to take place and inviting anyone with an objection to attend and make his protest.<sup>9</sup> Usually, however, there was no question as to the identity of the defender. A typical example was the constitution of procurators by John Shaw 'to persew & follow the actioun & caus movit be him apoun Johnne Crawford of Drongane'.<sup>10</sup> Conversely, special constitutions could also be defensive, made in response to a summons already raised against the litigant in question. For example:

'Comperit Jhone Nudry william robesoun James prestoun alex[ande]r andersoun henry calendar thomas bad Jhone andersone robert gardner & constitut maister thomas marjorbankis procu[ratou]r for thame in the actioun movit at the instance of sir william lothiane aganis thame *Et promisit de Rato*'.<sup>11</sup>

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<sup>7</sup> C.S. 5/26 fol. 93r: 6 March, 1514.

<sup>8</sup> C.S. 5/37 fol. 140r: 4 July, 1527

<sup>9</sup> E.g. C.S. 5/36 fol. 37v, where a deed containing a reversion was transumed because part of its seal was broken and the petitioner was afraid the rest might break by handling removing the deed's evidential value. Interested parties were summoned by open proclamation at the mercat cross in Dumfries.

<sup>10</sup> C.S. 5/26 fol. 31r: 10 January 1514.

<sup>11</sup> C.S. 5/42 fol. 6r: 24 January 1531.

Similarly, John Cunningham named procurators ‘to ansuer at the instance of the erle of Rothes quhatsoevir day or place eftir the tenour of the summondis’ against him’ and Alexander Stewart did so ‘in defense’ of an action moved against him by Elizabeth Stewart and her mother.<sup>12</sup> There were also special constitutions which were simultaneously designed to defend an action and to raise a counter action. An example of this occurred in 1522 when Agnes, lady Bothwell, constituted procurators to act for her in actions which she brought against the provost of Guthrie and which he brought against her.<sup>13</sup>

There was a third type of constitution although it is questionable whether it should be classified separately. This was the special and general constitution. Typically, such a constitution provided for procurators against a named party and ‘in all utheris actiounis quhatsumevir’,<sup>14</sup> ‘in all utheris materis’,<sup>15</sup> or against all other parties. This differed from the special constitution in that the power was included to act not only against a named party, but also ‘in all other actions’. It was distinct from general constitutions, in that a specific party was named. The significance of this distinctiveness, if there was any, is more properly assessed in the discussion of procurators’ powers which follows later.

What is evident is that the interaction between recorded constitutions and court appearances is far from straightforward. The appearance of Robert Leslie’s name in a constitution recorded by the clerks occurred on 242 occasions. He is recorded in the

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<sup>12</sup> 6 November, 1516; C.S. 5/31 fol. 182r: 15 November, 1518.

<sup>13</sup> C.S. 5/33 fol. 67v: 5 December, 1522.

<sup>14</sup> E.g., C.S. 5/41 fol. 25r: 19 March, 1530.

<sup>15</sup> E.g., C.S. 5/22 fol. 106r.



*acta* appearing on behalf of 282 separate clients.<sup>16</sup> Clearly, Leslie did not act for every litigant who named him as one of their procurators. Only in eleven constitutions was he alone named as procurator and normally he was only one of a group nominated jointly and severally; it is not therefore surprising that he is recorded appearing only for a minority of those who constituted him.<sup>17</sup> Conversely, very few constitutions were recorded from those clients for whom Leslie did act. Only in respect of 43 (15%) of the clients for whom he appeared had the constitution been recorded.<sup>18</sup> Nor is this unique. Robert Galbraith, constituted 265 times, was named to act on his own as procurator on only seven occasions. Out of the 257 clients for whom he appeared, only 29 (11.3%) are recorded as having constituted him. If the recording of every constitution were essential, then the clerks would have had to record very many more than they actually did. There are gaps in the record, the major ones covering the year from November 1511 to November 1512, and the period 1519-1522. But the discrepancy between those represented and those naming representatives is so great, and the gaps relatively few and well concentrated, that they are insufficient to explain it. Naming procurators, like raising an action, may have been one means of getting the other party's attention in the hope of encouraging a settlement out of court. Some constitutions would therefore stand alone, leaving no reference to subsequent legal action because, although contemplated, no such action required to be taken. This would help to account for the high number of constitutions; but it does not serve to

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<sup>16</sup> This figure represents first named clients only. Where a list of clients is given, only the first named in that list has been used for statistical purposes. Appearances were either as procurator or forespeaker.

<sup>17</sup> Constitutions naming multiple procurations invariably were made '*coniunctim et divisim*' or '*in solidum*'. The routine naming of multiple procurators also occurred in the English courts both ecclesiastical and common law: Sayers, *Papal Judges Delegate*, 230.

<sup>18</sup> Sometimes the same person can appear with more than one designation: thus the master of Hailes, who constituted Leslie in 1528, was the same man as the earl Bothwell for whom Leslie appeared in 1534.

explain why such a low proportion of clients actually recorded constitutions. The conclusion must simply be that the clerks did not record every constitution in the *acta*.

It is hard to explain why this was the case although there are several possibilities. A constitution had to be made but, although it was normally in the party's interests to have it recorded, strictly this was not necessary. Some parties may have taken the view that as long as the lords were aware the constitution had been made - and that a reputable procurator had been nominated - there was no need to waste money paying the clerks to record this fact in the books of council. After all, in the event of difficulty there would always be other evidence of the constitution in the form of letters of procuratory and instructions written by the client. On this view, registration was a luxury that perhaps gave added security but which might nonetheless be dispensed with, especially when the procurator nominated was a well-known man of law. As pleading increasingly became a livelihood, the leading advocates would not risk placing themselves in jeopardy by making the elementary mistake of acting without proper authority. Another possibility is that the constitutions once made might have been recorded elsewhere. Given the high degree of crossover in personnel between the civil and church courts, it is possible that constitutions recorded before a judge spiritual could retain their validity before judges temporal and vice-versa.<sup>19</sup> There is no direct evidence of this in the *acta* of the lords but then that is hardly to be expected: it would have defeated the purpose if a litigant, having informed the lords of an earlier constitution recorded elsewhere, was then also required to register it in the books of

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<sup>19</sup> The interchange in personnel was also common elsewhere in Europe. See, for example, Martines, *Lawyers and Statecraft*, 91.

council. Certainly there was no separate book of constitutions maintained by the clerks of council prior to 1534. In May of that year James Foulis, the clerk register, was ordered to make and maintain such a book and from 1535 only a very few constitutions were recorded in the *acta*.<sup>20</sup> Unfortunately, the book which was used to record constitutions has not survived. In general terms registration, although perhaps the best evidence that a valid constitution had been made, was merely one means of proving it. Any figures taken from those constitutions which were recorded - and which have survived - must be viewed with the *caveat* that there were other unrecorded constitutions. This will not invalidate the figures, of course, but it will perhaps only make them helpful as indications of general trends and most useful when supplemented by other evidence.

### **Letters of Procuratory**

Although less likely to survive than constitutions recorded in court books, letters of procuratory provide more evidence of the basis upon which such constitutions were made. Various types of such letter might be issued corresponding to the different modes of constitution possible. They were witnessed and notarised, often subscribed by the granter, and sealed. In some cases a burgh seal, or a notary's seal, might be used; in one case Robert Galbraith was constituted to resign some lands under the seal of Helen Campbell, the wife of the earl of Eglinton.<sup>21</sup> In content, the letter could specify a particular court or indicate that the procurator might appear in any court to pursue a particular matter or matters relative to a particular party. Thus the earl of

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<sup>20</sup> *A.D.C.P.*, 422.

<sup>21</sup> *Prot. Bk. Alexander King*, no 118: 23 May, 1556 (use of notary's seal); *Prot. Bk. Foular*, iii, no. 194: 8 April, 1521 (Eglinton).

Errol in 1525 named procurators, including Robert Leslie, to appear before the king and council to pursue a summons at his instance.<sup>22</sup> In contrast, one of the tutors of Egidia Young named procurators to carry on processes on her behalf against Sir John Young before the lords of council or any other judge temporal or spiritual.<sup>23</sup> In a slight variation on this, the bishop of Brechin named procurators to act in his name '*coram dominis consiliariis seu dominis auditoribus*' in an action moved against him by the burgh of Montrose.<sup>24</sup> As well as naming the court or courts where the procurators were to act, the place (however vaguely expressed) was also given. In unusual circumstances, such as plague, courts might move and often the procuratory might indicate that procurators are to appear '*coram dominis consilii in pretorio de edynbrocht vel ubi contingit eos*'.<sup>25</sup> It was normal to include a date but again this was circumscribed by such phrases as 'or any uther dais lauchfull', or 'with continuation of days'. In the case of the burgh of Montrose against the bishop of Brechin, the date expressed was '*quarto die cessionis vicecomitatus Angusiae seu quibuscunque aliis diebus*' referring to the geographical division of summonses heard before the lords of council.<sup>26</sup>

A letter of procuratory, as well as being special or general, might include not only reference to a particular action but also instruct the raising of a counter-action. The burgh of Cupar issued a procuratory in 1518 naming procurators to defend it against a

<sup>22</sup> *Errol Chrs.*, no. 341; (S.R.O.) NRA(S) no. 925.

<sup>23</sup> *Prot. Bk. Foular*, iii, no. 421: 4 September, 1523.

<sup>24</sup> *Reg. de Brechin*, ii, 161: 10 November, 1508. It is not clear whether '*auditoribus*' refers to the Lords Auditors of Parliament or of the Exchequer. In the absence of the word '*scaccarii*' probably the former was meant.

<sup>25</sup> (S.R.O.) G.D. 25/1/281.

<sup>26</sup> *Reg. de Brechin*, ii, 161.

summons brought by the King and the archbishop of St Andrews, and also to pursue a summons against the provost and bailies of St Andrews.<sup>27</sup> Other reasons, apart from the need to raise or defend an action, might be narrated as the basis for the procuratory. For instance, as happened in the case of Alexander Ferguson in 1556, the letter might indicate that the granter was naming someone to act for him during an absence abroad.<sup>28</sup>

It is possible that letters of procuratory were issued without prior consultation with all of those named as procurators. Refusals to act by men of law will be discussed in greater depth in chapter four, however there are instances noted in the *acta* where in specific terms the office of procuratory was either accepted or declined.<sup>29</sup> The same was even the case with arbiters who, having been chosen by a particular party, might decline the appointment.<sup>30</sup> A letter of procuratory from the English warden, Lord Dacre, was unsuccessful even when presented by Margaret Tudor; no-one named in it was prepared to accept the office.<sup>31</sup> In this context, the extraordinary case of Marion Frog, an English based litigant, is perhaps the most instructive. In 1517 Marion had purchased royal letters for one hundred pounds which gave her licence to succeed to

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<sup>27</sup> (S.R.O.) B13/21/1/16: 20 July, 1518.

<sup>28</sup> *Prot. Bk. Grote*, no. 83: 20 January, 1556. See also the abbot of Kilwinning, who named procurators during his absence in France: C.S. 6/4 fol. 112v: 29 April, 1534. It was normal for those going abroad on royal business to obtain letters of protection from the king safeguarding his property until his return. For example, Sir John Campbell of Lundie did so in 1530 during an absence in Flanders on business for the king (C.S. 5/41 fol. 2v) as had John, Lord Hay of Yester in 1529 when he was on the king's service in the Borders: C.S. 5/39 fol. 133r.

<sup>29</sup> E.g., C.S. 5/29 fol. 25v (acceptance of office by Patrick, Abbot of Cambuskenneth, to act for William Lamb); C.S. 5/19 fol. 238r (renunciation of procuratory, by Master Walter Lang and Thomas Fleming, to act for George, Earl of Rothes). The same practice was found in the church courts, Ollivant, *Court of the Official*, 58, fn. 179.

<sup>30</sup> E.g., C.S. 5/32 fol. 112r: 9 March, 1518.

<sup>31</sup> C.S. 5/32 fol. 90r: 28 February, 1518.

whomever she was 'nerest of kyn'.<sup>32</sup> She was to enjoy all lands and goods she obtained thereby even though she remained in England. On this basis, she inherited the lands of Janet Smith five years later and alienated them, as she had the right to do in terms of the licence, to the Edinburgh burgess James McCalzeane.<sup>33</sup> It seems that Marion, for remaining in England, was then escheated in spite of having purchased the licence, and the Stirling burgess Alexander Forrester obtained the escheat.<sup>34</sup> He then raised an action against James, as the possessor of the lands, who called on Marion as his warranter to defend him. Marion sent a letter of procuratory to Edinburgh. Alexander's forespeaker, Master Henry Spittall, had it recorded that Masters Thomas Hamilton, Robert Galbraith and John Lethame 'acceptit the office upoun thaim as proc[uratu]ris for marioun frog remanand within Ingland'.<sup>35</sup> Over a year later the dispute was continuing. Galbraith, for Marion, argued that the summons had not named his client but had named only James McCalzeane together with Marion Frog's procurators. He argued that 'the principall parti' should be called, and not her procurators. This was unsuccessful; Marion's 'pretendit procuratouris' were ordered to produce in evidence the letters of licence which she claimed to have. The significance of this case lies in the refusal of the procurators to be identified with their principal; this is a revealing attitude even though, in procedural terms, the argument was lost.

<sup>32</sup> C.S. 5/33 fol. 48r: 28 November, 1522; C.S. 5/34 fols. 129v-130r: 26 February, 1524.

<sup>33</sup> The father of the advocate, Thomas McCalzeane.

<sup>34</sup> The precise legal basis of the escheat is unclear. The record indicated that Marion was escheated for remaining in England. It is possible that the goods were considered to be escheat because Janet was thought to have died without heirs.

<sup>35</sup> C.S. 5/33 fol. 48r: 28 November, 1522. On 17 July, 1517, a constitution by Marion was recorded naming, in addition to those who later accepted office in 1522, James Simson and Abraham Crichton to represent her against the king and William and John Richardson in an action concerning land in the burgh of Edinburgh: C.S. 5/30 fol. 94r.



## Types of procurator

Until now, the term ‘procurator’ has been used without further differentiation. But before discussing the basic powers which were granted to procurators, it is necessary to consider in more detail how the term was used in the early sixteenth century. There is no explicit contemporary evidence of the distinction existing in Scotland between procurators *judicialis* (or *ad lites*) and procurators *de negotia* which was made by the Dutchman, Philip Wielant, in his *Practijke Civile* (1519).<sup>36</sup> Balfour makes no such distinction in this context.<sup>37</sup> Skene, in defining the word ‘actornatus’ in his *De Verborum Significatione* (1597), does recognise the different functions which an attorney may perform. First, he mentions both the *responsalis* (‘he quha makis answer for ane uther in judgement’) and the *prolocutor* (‘he quha speaks for the persewer’).

Then he goes on:

‘Alswa *actornatus* is he quha dois any thing in an uther mans name or behalfe, as he quha compeiris for an uther in courtes, or justice aire, to pass upon inqueistes, and serving of retoures to the kingis chapel...’

These alternative definitions seem more akin to Wielant’s distinction although they fall some way short of actually making it.

In terms of personnel it is certainly the case that Scottish practice in the early sixteenth century knew no great distinction between procurators who pled in court, and those who performed other tasks, mainly relating to the granting, resignation and

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<sup>36</sup> A. Wijffels, ‘L’assistance judiciaire dans le Pays-Bas méridionaux 1. Avocats et procureurs au Grand Conseil de Malines’, Société Jean Bodin, Congrès de Copenhague (1993), 4. Henceforth, Wijffels, ‘*Avocats et procureurs*’.

<sup>37</sup> But Balfour does distinguish curators *ad lites* and curators *ad negotia*: *B.P.*, i, 122.



receiving of sasine in the civil context<sup>38</sup> or presenting dispensations from the Roman penitentiary and making binding obligations on oath under threat of excommunication in the ecclesiastical.<sup>39</sup> The same people might perform both types of undertaking, although a larger number and a greater variety of people undertook the latter. Skene does, however, recognise a functional distinction between the two types of activity for which procurators might be employed and, provided care is taken, it seems safe to apply Wielant's useful terminology in the context of Scotland.

In Scottish practice a judicial procurator was not simply a procurator who appeared in court on behalf of another. There were two main reasons why a procurator might appear before a court: either to plead the merits of the case on behalf of his client, or to perform a formal act such as petitioning for a curator, seeking to have a deed copied, or consenting to the registration of a deed for preservation or execution. These two types of activity differ primarily in the amount of discretion given to the procurator, and the degree to which the client had to rely on the forensic skills of the particular man he had chosen to represent him. Only those employed in court to use their own skill and judgement as a procurator independently of those who employed them should properly be considered judicial procurators. In practical terms such

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<sup>38</sup> In February 1510, John, Earl of Crawford, resigned the office of sheriff of Aberdeen by using procurators: (S.R.O.) NRA(S), no. 925 (Errol Charters).

<sup>39</sup> An example of the latter indicates that the same procurators might appear in both contexts. In 1530 the advocates Masters Henry Lauder, James Carmuir, John Lethame and William Blackstock were among those named to present a dispensation on behalf of Robert Crawford of Beircriftis, before the archbishop of St Andrews: *Prot. Bk. Johnsoun*, 3 (no. 15): 2 October, 1530. For examples of procuratories naming procurators to enter obligations into church court act books see *Prot. Bk. Gaw*, nos 77, 159, 161 and 162 and, for an earlier example, *Prot. Bk. Ros*, no. 541. For procurators producing a mandate '*lectum et admissum*' before a vicar general, see *Prot. Bk. Simon*, 88-9 (no. 116): 3 April, 1505.



procurators differed from every other kind of procurator in that unlike the others they could not be constituted irrevocably.

In his *Practicks*, Balfour discusses the issue of revocation only in respect of the procurator constituted ‘in ony actioun or cause, the quhilk Procuratour answeris in the samin cause, and dois that quhilk pertenis to the office of ane Procuratour’.<sup>40</sup> This is somewhat enigmatic but clearly he has in mind procurators who answer pleas on behalf of clients. By his time, the ‘usual powers of a procurator’ were so well known that he saw no need to define them closely.<sup>41</sup>

Surviving texts of letters of procuratory demonstrate that judicial procurators, as defined above, were not constituted irrevocably. To take just four examples. In 1500 Lord Erskine, in perhaps the most comprehensive extant letter of procuratory, constituted six men his ‘verray lauchfull and undowtit procuratouris, actouris, factouris and speciale erand beraris’ to appear before the lords of council to answer a summons raised by the earl Bothwell.<sup>42</sup> Twenty years later, in identical terms, James Brown named five ‘*veros, legitimos et indubitatos, procuratores, actores, factores et negotiorum...gestores*’ to raise a brieve of inquest.<sup>43</sup> In 1565 Matthew, Earl of Lennox, named ‘verray lauchfull and undoutit procuratouris’ to raise a brieve of inquest to serve his wife as heir to her grandfather.<sup>44</sup> Nine years later, the principal of

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<sup>40</sup> *B.P.*, ii, 301.

<sup>41</sup> This phrase appears in a notarial instrument in November 1561: *Prot. Bk. Grote*, 45, (no. 202). Phrases such as ‘*in forma consueta*’, ‘in the largest form’ or ‘*in uberiora forma*’ are regularly found as part of the notation used when constitutions were recorded.

<sup>42</sup> *A.D.C.*, ii, 473-4.

<sup>43</sup> Fraser, *Montgomeries*, II, 92: 7 December, 1520.

<sup>44</sup> Fraser, *Lennox*, II, 262-3.

St Leonard's College in St Andrews, and others, named 'verry lauchfull & unduttit procuratouris' to defend them against an action of spuilzie raised by David Moneypenny of Pitmillie.<sup>45</sup> The two procuratories concerning brieves of inquest dealt with non-pleadable brieves (although it is not clear to what extent this distinction was properly observed at this period).<sup>46</sup> Even so, raising a breve and ensuring that it was served correctly was a task which might easily lead to legal difficulties requiring independent thought by the procurator. One such procuratory instructs those named:

'to persew and follow [the brieves of inquest] be all proces and ordour of law that is requyrit, liticonstestatioun to mak, the aitht of suithfasnes to sweir, my absence to excuis, writtis, witnes, previs and documentis to produce and leid, and aganis me producit and led to except and impugne, actis, instrumentis, retouris, letteris of actornais, and preceptis of saising, and all utheris documentis and letteris necessar thairupoun to lift, ask and rais...'.<sup>47</sup>

This was clearly a potentially complex procedure. By contrast, those procurators who were constituted irrevocably tended to be those whose activity involved following a set procedure in a mechanical way without the need for discretion on their part. In Dumfries in 1528 John Armstrong constituted Robert Leslie and others as his 'werray lachfull and irrevocable procuratouris' to resign the lands of Langholm to Robert, Lord Maxwell.<sup>48</sup> The previous month, in his lodging in Edinburgh, Hugh, Lord Somerville, gave his 'free, full and irrevocable power and mandate' to procurators named to resign a tenement of land in Edinburgh by delivery of earth and stone into

<sup>45</sup> St Andrews University Library (S.A.U.L.), SL 110 L7.6: 29 January, 1574.

<sup>46</sup> The distinctions between different brieves appear to have become confused during the sixteenth century. Skene, *D.V.S.*, wrongly identified the breve of mortancestry with the breve of succession, confusing a pleadable breve with one that was retourable.

<sup>47</sup> Fraser, *Stirlings of Keir*, 364: 27 October, 1539.

<sup>48</sup> Fraser, *Caerlaverock*, II, 465.

the hands of one of the bailies of the burgh.<sup>49</sup> The same formulation, '*meam plenam liberam et irrevocabilem potestatem ac mandatum*' had been used by Master David Lauder in naming procurators in 1517 for resigning lands in favour of the Edinburgh burgess Gilbert Lauder and his wife.<sup>50</sup> Alexander Stewart of Grandtully, in resigning his lands in favour of his son, appointed '*veros, legitimos, indubitatos et irrevocabiles procuratores*' to do so.<sup>51</sup> In November 1560, the advocate Richard Strang ratified on behalf of Alexander Doles and his heirs, a decret pronounced by the lords in favour of Lord Gordon, against him. Appearing in court, he renounced on Alexander's behalf any right to question the decret, and to any action of warrandice which he or his heirs might have had against the earl of Huntly or his heirs. The procuratory by which Strang, and others, were constituted was preserved and it clearly shows that Alexander made them his '*verray lauchfull and undowtit and irrevocable procuratouris*'.<sup>52</sup> This last example demonstrates that it was the task, not the procurator, which defined whether or not he might be constituted irrevocably. In short, the evidence suggests that although the terminology adopted by Wielant was not used in Scotland the concept that lay behind it was well known. More than that, the concept itself had a practical consequence in terms of the revocability of the relationship between a procurator and the party he represented.

In the case of a procurator *de negotia*, the extent of the procurator's power was defined by the task assigned to him. The principal was able to pre-determine the

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<sup>49</sup> *Prot. Bk. Foular*, iii, 26 (no. 71).

<sup>50</sup> (S.R.O.) G.D. 10/47: 9 February, 1517. One of the procurators named was Master Henry Lauder, Gilbert's son and the future king's advocate.

<sup>51</sup> Fraser, *Grandtully*, I, 75 (no. 44): 1 March, 1539.

<sup>52</sup> (S.R.O.) R.D. 1/4 fol. 83b.

extent to which the procurator might affect his position; in other words, he could control in advance his ultimate liability. The lands which were to be resigned or exchanged, or the rights to be given up or recorded, were carefully defined in the procuratory and the procurator need only comply. The very limits on the procurator's input explains why such procuratories tended to be irrevocable: the need to revoke them would not arise since the principal had already committed himself to act. In the case of a judicial procurator this was not the case. The procurator, by his own performance, might prejudice his principal's interests beyond his expectation; he might make concessions which the principal would not have made had he been present. The relationship between procurator and principal might break down as a result. After all, unlike other kinds of procurator, judicial procurators might spend years pursuing or defending an action; that is why on the continent such procurators, or *procureurs*, were sometimes called '*dominus litis*' or '*maître de la cause*'.<sup>53</sup> If made irrevocably, the principal might find himself stuck with a procurator in whom he had lost confidence. Balfour makes this very point, when he says that a procurator may be replaced by his principal '*speciallie gif ony deidlie feid or inimitie has intervenit betwix thame*'.<sup>54</sup>

### **The powers of a procurator**

Two obvious issues present themselves when considering the scope of a procurator's authority: when was the procurator eligible to act for his client, and what could he do when he was? Clearly, a procurator constituted generally was eligible to act in all of

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<sup>53</sup> Wijffels, '*Avocats et procureurs*', 6. The Dutch phrase was '*meester vander sake*'.

<sup>54</sup> *B.P.*, ii, 301.

his clients' future actions. If constituted specially then his ability to act was circumscribed and normally the clerks would give a brief indication of how it was limited (either to a particular action or to actions involving one or two particular opponents).<sup>55</sup> As an aside, it is worth mentioning that Balfour uses the terms 'special' and 'general' slightly differently.<sup>56</sup> He makes the obvious assertion that a procurator, once constituted and granted sufficient power, can do anything which his client could do were he personally present. In this sense, he exercises a general mandate. But such a procurator cannot compromise in the action (i.e. submit the dispute to arbitration) unless he has a *special* mandate to do so.<sup>57</sup> Balfour then mentions other powers which procurators do not possess without a special mandate or procuratory. This passage only concerns the powers of a procurator: on the presumption that the procurator can act in a given case, Balfour then delineates what he can do under a general mandate. Consequently his comments do not bear upon the prior question of when a procurator may be eligible to act.

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<sup>55</sup> I would differ here from Dr Ollivant, who appears to consider general procurators to have more limited powers than special procurators: *Court of the Official*, 58, fn. 177. His argument, based on Balfour, would seem to be that a procurator, if he only held a general mandate, must find caution *de rato* as a guarantee of the client's subsequent ratification. The passage from Balfour, however, merely says that no one may be a procurator unless there is a *ratum* clause in his mandate; if there is no such clause, then even a procurator with a general mandate may be repelled unless he can find caution himself: *B.P.*, ii, 299. This does not suggest that the general procurator has to find caution for each case in which he is involved, provided his client has promised to ratify his actions in the mandate. All sixteenth century recorded constitutions, with very few exceptions, indicate that the mandate included the *ratum* clause regardless of whether the constitution was special, general or both. Balfour does also say that no one may be a procurator without a 'special' mandate, written and sealed and containing sufficient power to win or lose. This is straight from *Regiam Majestatem*. But Balfour does not here use the word 'special' in the sense in which I have used it; he simply means there must be a sufficient mandate. Otherwise, Balfour would be arguing the absurd proposition that only special procurators could appear in court when the evidence is clear that general procurators could do so and often did.

<sup>56</sup> *B.P.*, ii, 300.

<sup>57</sup> My italics. The phrase 'special mandate' should perhaps be understood in this context as 'particular mandate'.

It is in the context of a special and general constitution, that this question is most difficult to answer. There are two ways to view such constitutions. First, they can be seen as having no particular significance in themselves and as merely representing another way of recording what in substance was a general constitution. Put simply, in his concern to avoid doubt the litigant identified the particular party against whom he wished to be represented. This makes perfect sense once it is understood that the clerks of council, in recording constitutions, did not include the date on which the procuratory was made.<sup>58</sup> Only the date of recording was given. There are certainly examples of cases where part of the action is mentioned in the *acta* prior to the entry in which a constitution of procurators was recorded.<sup>59</sup> If the constitution was general, and made no mention of the case already underway, then doubt might arise as to whether the procurators named had authority to appear in that case. This argument would be stronger if special and general constitutions were always defensive (i.e. made in response to a summons already raised). But they were not. There are numerous examples of a litigant naming procurators to bring an action on his behalf against a named party and to represent him in all other actions.

The second theory is more complex but does give more significance to the formulation used by the clerks. On this theory, the special and general constitution was essentially a special constitution but extended not only to one action or to one party but to all actions resulting from a particular dispute and to all those who had an

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<sup>58</sup> The main reason given by the lords for making a separate book of procurators was that they might know the time that the constitution was made: *A.D.C.P.*, 422.

<sup>59</sup> E.g., C.S. 5/32 fols. 10r, 35r, 81r: 22 November and 2 December, 1518, 23 February, 1519: Robert Crichton of Eliok against William Ramsay and Elizabeth Melville. The constitution occurred on the date last mentioned.

interest in that dispute. The evidence in favour of this interpretation is circumstantial and primarily comes from the constitutions which were recorded. For example, in 1522 Lord Hay constituted Henry Spittall as his special and general procurator; less than two years later, he then constituted him again as his special procurator against a different opponent.<sup>60</sup> The question arises: why was the first constitution no longer sufficient? Did the original constitution lapse once the case concerning the first opponent was concluded? Less than two months elapsed between Lord Gray naming special and general procurators against one party and then naming special procurators to represent him against a different opponent.<sup>61</sup> It may have been the case that the death of one of the original procurators named necessitated the making of a new special and general procuratory. There are several possible examples, although the best is that of John Houston of that ilk.<sup>62</sup> In 1530 Houston named as his special and general procurators Robert Galbraith, James Foulis, William Blackstock and John Houston of Lamy.<sup>63</sup> Four years later, he named Galbraith, John Houston and John Lethame on the same basis in a different action. During this period, Foulis had become clerk register (and so was ineligible) and Blackstock had died. The original procuratory may therefore have lapsed and it may be this reason, rather than the fact that a new action was involved, which explains why the second constitution was made.

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<sup>60</sup> C.S. 5/33 fol. 12v: 13 November, 1522; C.S. 5/34 fol. 62v: 28 January, 1524.

<sup>61</sup> C.S. 5/22 fol. 32v: 21 February, 1511 (naming James Henryson, Adam Otterburn, Robert Monorgund against John Campbell); C.S. 5/22 fol. 117v: 2 April, 1511 (naming Adam Otterburn against the laird of Wemyss).

<sup>62</sup> The death of Thomas Hamilton may have required fresh constitutions by James Auchinleck and John Crichton; William Blackstock's demise may have may have required fresh constitutions to be made by Thomas Davidson and Humphrey Galbraith. See Appendix 1.

<sup>63</sup> C.S. 5/41 fol. 79r: 19 May, 1530; C.S. 6/4 fol. 132v: 8 May, 1534.



It is difficult to make sense of the pattern demonstrated by the recorded special and general constitutions. Although some were repeated, no two are identical: there was always a difference even if only in the name of one of the procurators or in their total number. The Edinburgh widow, Janet Adamson, made two such constitutions separated by only seven months.<sup>64</sup> Both named the same opponent, George Touris. The only differences between them were that in the former Thomas Marjoribankis was one of the four procurators named, whereas in the latter his place was taken by Robert Galbraith, and that the procurators in the latter were granted the power to substitute. James Douglas of Cavers similarly made two special and general constitutions within a year of each other, naming five procurators in the first but only three of those five in the second.<sup>65</sup> Lord Gray made two constitutions of this type two years apart naming three procurators each time but, like Janet Adamson, changing one of them.<sup>66</sup> Less than three months elapsed between two such constitutions made by Lord Livingstone, the second naming the same procurators as the first although one fewer.<sup>67</sup>

Surprisingly there is no evidence that general constitutions were less subject to renewal or alteration than special, or special and general, constitutions. It is certainly true that some parties having made a general constitution are not thereafter recorded making any subsequent constitution.<sup>68</sup> In some cases, although a subsequent

<sup>64</sup> 26 June 1533: C.S. 6/2 fol. 209r; 19 January 1534: C.S. 6/3 fol. 159r.

<sup>65</sup> 23 June 1518: C.S. 5/31 fol. 40r; 1 March 1519: C.S. 5/32 fol. 97r.

<sup>66</sup> 21 February 1511: C.S. 5/22 fol. 32v; 2 April 1511: C.S. 5/22 fol. 117v.

<sup>67</sup> 25 June 1524: C.S. 5/34 fol. 182r; 15 September 1524: C.S. 5/34 fol. 206r.

<sup>68</sup> For example, George, lord Seton, whose general constitution was recorded on 31 January, 1509 (C.S. 5/20 fol. 78r); William, Earl of Errol (13 February, 1509: C.S. 5/20 fol. 113v); John Brown, burgess of Ayr (31 July, 1517: C.S. 5/30 fol. 131v); William, Earl Marischall (23 July, 1527: C.S. 5/37 fol. 174r, naming advocates as his curators); Henry Congilton of that ilk (25 February, 1531: C.S. 5/42 fol. 71r); Alexander Milne, Abbot of Cambuskenneth (28 March, 1531: C.S. 5/42 fol. 148v).



constitution (of whatever type) was made it was not made for several years.<sup>69</sup> There are a number of cases, however, in which a general constitution was repeated relatively quickly;<sup>70</sup> or was soon followed by an alternative type of constitution.<sup>71</sup> It cannot be concluded that special constitutions were short term whereas general constitutions, or special and general constitutions, were intended to be long-term. The evidence points to a more complex picture in which the nomination of procurators was driven by events in the real world rather than by the careful planning of litigants.

Presuming the procurator was entitled to act, the powers he enjoyed varied according to the terms of his constitution. He could be given the specific authority to pursue, to argue and finally to conclude the action (*'prosequi mediare et sine dubite terminare'*)<sup>72</sup>. Phrases such as 'baith to persew follow and defend as law will' were not uncommon in recorded constitutions and would appear to represent the minimum in terms of the level of power granted.<sup>73</sup> To these might be added other powers. One litigant named procurators to defend and follow and 'to defer to the aith of george

<sup>69</sup> For example, David Hoppringle made a general constitution which was recorded on 10 February 1505 (C.S. 5/16 fol. 68v), and next appears making a special constitution on 4 February 1510 (C.S. 5/21 fol. 118v). Robert Lauder of Bass made a general constitution which was recorded on 27 January, 1506 (C.S. 5/18/1 fol. 3v). He next appeared on 27 February, 1518 (C.S. 5/30 fol. 207r), making a special and general constitution.

<sup>70</sup> For instance, Alexander Hamilton, Abbot of Kilwinning, made a general constitution on 13 January 1533 (C.S. 6/2 fol. 43v), and made another one on 29 April, 1534 (C.S. 6/4 fol. 112v) naming different general procurators; William, lord Carlyle did the same on 19 January, 1507 (C.S. 5/18/2 fol. 113r) which was followed by another on 10 February, 1508 (C.S. 5/19 fol. 153r).

<sup>71</sup> For example, Robert Ayton made a general constitution on 26 February, 1529 (C.S. 5/39 fol. 116r) and then a special and general one a few months later (C.S. 5/40 fol. 132v: 23 October, 1529); John Murray of Fallahill made general procurators on 18 January 1507 (C.S. 5/18/2 fol. 106r), and the same man may then have made special procurators on 5 February, 1508 (C.S. 5/19 fol. 137v); Robert Scott made special procurators on 4 February, 1506 and then, just ten days later, special and general procurators (C.S. 5/18/1/ fols. 37v, 83r).

<sup>72</sup> For example, the constitution made by Neil Ferguson in 1527: (S.R.O.) G.D. 25/1/281. Cf. the constitution of James Brown in 1520 *'prosequi, mediare, terminare, finire et ad effectam producere'*: Fraser, *Montgomeries*, II, 92.

<sup>73</sup> 14 August, 1511: C.S. 5/23 fol. 125v.

middilmas'.<sup>74</sup> More generally, the procurator might be given power to substitute another or others in his place (*cum potestate substituendi*), or to concord (*cum potestacione concordandi*), treat (*cum potestate tractandi*), or compromise (*cum potestate compromittendi*), that is, to submit the matter to arbitration.<sup>75</sup> It was possible for several procurators to be named but for a specific power to attach to only one of them.

The numerous references to a party being required to appear in court with a sufficient mandate indicates that letters could be issued without the grant of sufficient authority to the procurator to allow him to bind the principal to a particular disposal of the case. Even when adequate power was granted, the procuratory might still be ineffective on a technical ground. In one case, Henry, Lord Sinclair, complained that a procuratory produced on behalf of the burgh of Dysart was ineffectual because it contained the names neither of the bailies whom he had originally summoned, nor of those who then held office.<sup>76</sup> As a result, parties sometimes demanded that a cautioner guarantee the sufficiency of a procuratory. Adam Otterburn and James Logan, Sheriff depute of Edinburgh, were prepared to grant caution, to the value of one hundred pounds, that James Edmonstone would appear before the lords the following week 'be himself or his sufficient procur[atou]r[is]'.<sup>77</sup> In 1533, a notarial entry mentions that cautioners undertook to cause Mariota Fleming, widow of Alan Heriot, to appear in the tolbooth of Edinburgh '*per se vel sufficienis (sic) mandatum ad defendam in causa contra*

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<sup>74</sup> 18 February, 1507: C.S. 5/18/2 fol. 206r.

<sup>75</sup> It is doubtful whether there was any substantive difference in meaning between treating, compromising and componsing. Cf. Sayers, *Papal Judges Delegate*, 235-6.

<sup>76</sup> C.S. 5/18/1 fol. 86v: 17 February, 1506.

<sup>77</sup> C.S. 5/24 fol. 121r: 18 February 1513.

*eam*'.<sup>78</sup> The action in question was raised by Master Robert Heriot, presumably a relation to her late husband, to be heard by the advocate, Henry Lauder, acting as bailie *in hac parte* of the regality of Glasgow. In another case, it was alleged that John Dunbar of Cumnock, Sheriff of Elgin, had refused to admit and maliciously repelled Thomas Guthrie, who had sought to put forward defences as Alexander Innes' procurator, even though he had 'sufficient mandate and power thirto'.<sup>79</sup> In the long-running litigation between the prior of Whithorn and the burgh of Wigtown, the representatives of the latter promised 'to gett ane power of the toune...to compromitt and concord with quhithorne...or ellis to gett thair utir mynd and deliverance therein'.<sup>80</sup> Clearly they had not originally been given sufficient power to submit the dispute to arbitration.<sup>81</sup> Eventually the lords of session ordered both sides to produce and bring procuratories with them on a specified future date. The burgh's letters were to be sealed with the common seal of the burgh and to have sufficient authority 'to persew and defend the said actioun to compromit in the samin gif neid be and to be extendit in the best form with all clausis necessar'. The prior's procuratory was to be in similar terms although it was to be sealed 'under the chapel seile of the said place of quhithorne'.<sup>82</sup>

As well as guaranteeing adequate power, a procurator might be required to find caution that in the event the action was lost any liability would be met by his

<sup>78</sup> (S.R.O.) N.P. 1/2A fol. 47r (*Prot. Bk. Thos. Keane*): 24 July 1533.

<sup>79</sup> C.S. 5/31 fol. 49r: 30 June, 1518.

<sup>80</sup> C.S. 5/32 fol. 106r: 3 March, 1519; see SHS *Wigtownshire Charters*.

<sup>81</sup> Cf. the dispute between Malcolm, lord Fleming, and John, lord Hay of Yester, which was submitted to arbitration. John Lethame, Fleming's procurator, was specifically noted as being 'sufficietlie autorisit' to make the submission to arbitration on his client's behalf: C.S. 6/5 fol. 49v (6 July, 1534).

<sup>82</sup> C.S. 6/2 fol. 20v

principal. In one case, Master Robert Monorgund, kinsman to the earl of Huntly, sought to be admitted to procure in an action brought against the earl by the chancellor. He protested that he might do so provided he found 'caution de Ratihabitoune'. There is no indication of whether he contemplated obtaining this caution from Huntly or from some other party; provided he chose someone who was not a man of straw, presumably there was no objection to his finding a suitable local man to grant the guarantee.<sup>83</sup> Ultimately, however, the onus was on the principal to indemnify his procurator, and this will be discussed further below in relation to ratification.

In the areas of caution and sufficiency of mandate it was foreign litigants who were most likely to present difficulties. It is from a case involving a foreigner that there is evidence that a procurator did not specifically need to be granted the power to take the oath of calumny on behalf of his client. A letter of procuratory sent to Scotland by the Englishman William Woodhouse was allowed by the lords even though it 'maid na mentioun *de iuramentum calumpnie*'.<sup>84</sup> Presumably a power so fundamental was implied in every letter of procuratory: if there was no one to swear the oath, no case could successfully be brought. In 1511, Bardo Altavite produced a procuratory, which was also described as an 'instrument of power', upon which he intended to act as procurator for some merchants in Flanders. Having produced it he promptly took it

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<sup>83</sup> C.S. 5/33 fol. 110r: 19 December, 1522. Monorgund was parson of Culace. Huntly had used Monorgund's seal, not having his own with him, when he made a letter of procuratory naming Master John Garden to compone on his behalf with de la Bastie concerning the slaughter of Alexander Bannerman: C.S. 5/30 fol. 46r: 30 June, 1517. If Monorgund was within the fourth degree of consanguinity or affinity to Huntly, he could speak on his behalf without a mandate, provided he found caution: B.P., ii, 298.

<sup>84</sup> C.S. 6/6 fol. 65v: 3 March, 1535.

away again and refused to use it, whereupon the king's advocate, in the name of the entire realm and all the lords of session, offered to give him justice if he would show 'ane seyficiant powere'. The implication is that the instrument he originally produced was in some way defective or inadequate, or that he was not sure of his instructions.<sup>85</sup> In May 1525, a Dane, Hans Sanderson, defending a charge that he had unjustly taken a ship and cargo belonging to various men in St Andrews and Cupar, was required to find caution in case he was found liable. The men who were his cautioners indicate a high degree of inter-burgh co-operation as they include the Leith merchant and comptroller Robert Barton of Over Barnton, together with two burgesses from Aberdeen and two from Edinburgh. Hans had to promise to relieve them should he be unsuccessful; he then promptly named them his procurators together with the advocate James Foulis.<sup>86</sup> Although not a foreigner, Sir Alexander Fotheringham was a chaplain resident in Bruges.<sup>87</sup> His brother Charles, in producing a procuratory entitling him to act on his brother's behalf, required Lord Drummond to act as cautioner presumably because Alexander's assets were abroad.<sup>88</sup>

In 1531 another foreigner, James Eggart, a merchant in the Steelyard in London, made a constitution that indicates the variety of his needs and the demands which might be made upon his procurators. The Steelyard was the trading house of the Hansa and Eggart, a Baltic merchant, constituted three procurators and factors: his fellow countryman William Vicherling, Thomas Scott of Abbotshall and Gilbert Menzies

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<sup>85</sup> C.S. 5/22 fol. 105r: 29 March, 1511.

<sup>86</sup> C.S. 5/35 fol. 29v: 17 May, 1525.

<sup>87</sup> C.S. 5/23 fol. 116r.

<sup>88</sup> C.S. 5/23 fol. 64r: 23 July, 1511.

provost of Aberdeen.<sup>89</sup> These were to act for him in all actions that might concern him in the realm of Scotland, and they were ‘to ask craif and ressaif all soumes of money or uther geir pertening or that may pertene to him’. They were empowered jointly and severally, and any two of them (provided Vicherling was one) could grant discharges and securities in his name. In the circumstances, the granting of these unusual powers was understandable.

More generally, the powers which were granted in constitutions tended to be expressed in a stereotypical way. The litigant committed to his procurators his ‘full plane power, speciale mandement [*or generale and speciale command*], express bidding and charge’ (the special form being expressed in Latin as ‘*veram, liberam, puram et expressum potestatem ac mandatum speciale*’).<sup>90</sup> As was noted earlier, by Balfour’s time the powers of a procurator had become a matter of generally understood custom. This was true for the whole of the sixteenth century. By 1500, procurators were being empowered to do all things which in law normally pertained to the ‘office of procuratory’.<sup>91</sup> The letter of that date containing this phrase was made by Lord Erskine against Patrick, Earl Bothwell, and since it provides the most explicit statement of the powers conferred it is worth quoting at length. ‘Full plane power’ having been committed to them, the procurators were -

‘to ansuere to the said summondis and to al poynctis and articlis contenit tharintill, myne absence til excuse, litiscontestatione to mak, the aith of suthfastnes in my saule to swere, my parti adversare til here be sworne, my ressons and richtis to schaw, my pruffis, witnes, writtis and

<sup>89</sup> C.S. 5/41 fol. 159r: 14 January, 1531. Eggart is described as an ‘Esterling’ meaning that he was from the eastern Baltic.

<sup>90</sup> See *A.D.C.*, ii, 473; Fraser, *Lennox*, II, 262. For an example in Latin, see Fraser, *Montgomeries*, II, 92.

<sup>91</sup> *A.D.C.*, ii, 474.

documentis to produce and leid, and aganis thame producit and led be my parti adversare til object, except agane and impung, actis, decretis and instrumentis to ask, lift, raise and here be given, protestacions to mak, to tret, compone, concord, compromytand finalye to end, and generalye al uthir and sundri thingis to do, exerce and use that to the office of procuratory to sic thingis ordanis, pertenis or of law is knawin to pertene, with full power to ane or maa procuratouris or prelocutoris in thare stedis to make and substitut and at thair willis for to revok and destitut, and like as my self micht do and I war present in propir persone...'.<sup>92</sup>

This is so comprehensive it is little wonder the clerks of council generally preferred to condense such constitutions in standard three or four line notation. Even so, the catch-all provision that the procurators were to enjoy all the other powers generally pertaining to them in law was still included. This was probably designed to give added security; there is no indication elsewhere that powers additional to those specified actually existed although sometimes the phrase 'with full power to win and tyne' might be included.<sup>93</sup>

Although very unusual in being written into the *acta*, and extremely detailed, it is unlikely that Lord Erskine's letter was different in its general tenor from hundreds of others. There is certainly evidence, contrary to the statement in *Regiam* that litigants must appear personally to name procurators, that it was regularly done by letter.<sup>94</sup>

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<sup>92</sup> *A.D.C.*, ii, 473-4: 7 December, 1500. A near contemporary, although unpublished, letter of procuratory by Sir John Wemyss relating to litigation before the lords is very similar in its essentials; (S.R.O.) G.D. 26/4/661 (Leven and Melville Muniments): 15 February, 1502. Cf. also C.S. 5/17 fol. 157v: 31 December, 1505. In the powers granted, these are heavily influenced by Romano-canonical practice: Sayers, *Papal Judges Delegate*, 234.

<sup>93</sup> The power 'finalye to end', in the constitution by Erskine, was probably regarded as the equivalent of this clause.

<sup>94</sup> *A.D.C.*, iii, introduction, xxiv, where Dr Murray acknowledges that sometimes there was a written procuratory, sometimes the procurator was constituted in face of the court. The major difference in this context between the early fourteenth century, when *Regiam* was compiled, and the sixteenth century was in the proliferation of notaries whose appearance made it a great deal easier to have letters of procuratory drafted: G. G. Simpson, *Handwriting in Scotland 1150-1650*, (Aberdeen, 1973), Introduction, 7ff.



Lord Erskine's procuratory is one example. As has been seen, the brief entries which the clerks generally give often begin with the word 'comperit'. But sometimes the clerks go on to say that the litigant, having appeared, named procurators to represent 'me'; a clear indication that they were reading a letter of procuratory and summarising its contents.<sup>95</sup> There is also evidence that litigants were sending letters of procuratory to men of law.<sup>96</sup> That is not to say that the litigant did not appear but, generally speaking, personal appearances on such occasions seem unlikely or, at least, the litigant as well as appearing personally may also have produced a letter of procuratory. When John Carmichael personally appeared to name procurators in 1531, a memorandum was recorded intimating that his 'lettres' were with Robert Leslie, the first-named of his procurators.<sup>97</sup> It may well be that Scottish practice mirrored that before the *Grand Conseil de Malines* where the procurator, on his first appearance for his client, had to leave his 'power of attorney' with the clerk of registry.<sup>98</sup> There is certainly record of a letter of procuratory being delivered to the commissary of the official of St Andrews in 1517, although this nominated procurators to make a resignation of lands in favour of the sheriff depute of Edinburgh.<sup>99</sup> The following year Master John Williamson produced before the lords of session a procuratory for the dean of Glasgow and 'acceptit the office of procu[rato]ry apoun him'.<sup>100</sup> There are also references to cases where a 'power' was shown to the lords of session or the lords auditors of parliament.<sup>101</sup> In one case Master Edward Sinclair asked an instrument on

<sup>95</sup> E.g. C.S. 5/34 fol. 70v: 13 July 25

<sup>96</sup> E.g., James Ogilvy of Balfour sent a procuratory to Master Robert Galbraith in 1532 only to find that Galbraith was not in Edinburgh to receive it: C.S. 6/2 fol. 15v (26 November, 1532).

<sup>97</sup> C.S. 5/43 fol. 59r: 19 October, 1531.

<sup>98</sup> Van Rhee, *Great Council of Malines*, 94.

<sup>99</sup> (S.R.O.) R.H. 6/847: 29 April, 1517.

<sup>100</sup> C.S. 5/31 fol. 137v: 21 July, 1518.

<sup>101</sup> E.g., C.S. 5/18/1 fol. 119r: 23 February, 1506. And, in parliament, *A.P.S.*, ii, 434: 11 December, 1543.



behalf of Elizabeth Sinclair only for her opponent to obtain an instrument of his own narrating that Edward had shown ‘no power nor procuracioun of the said Elizabeth to ask the said instrument’.<sup>102</sup> In another, it was argued that a procuratory should be held invalid because it was interlined.<sup>103</sup>

As was demonstrated by the constitution made by the Hanseatic merchant, James Eggart, mentioned above, one procurator might be given more power than his colleagues. For example, in one constitution Robert Galbraith alone of those named was given the power to substitute. Presumably, the choice of any substitute was to be his.<sup>104</sup> On another occasion, only Nichol Crawford, of several procurators named, was to have power to agree with any opponent as if the client himself were present. Since the client was David Crawford, this is probably explained by a family connection.<sup>105</sup> In an ecclesiastical context, Edward Cockburn, parson of Ellon, named procurators to receive benefices, to conduct litigation concerning benefices or to resign them in favour of a richer benefice. Of the twelve procurators appointed, the laymen (except Sir John Home) had power to receive benefices only, while the clerics (together with Sir John) had power both to resign and receive them.<sup>106</sup> One of the clerics named as procurator was Master David Seton, parson of Fettercairn, who was one of the most active judicial procurators before the lords of council during James IV’s reign.<sup>107</sup>

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<sup>102</sup> C.S. 5/16 fol. 141r: 3 March, 1505. The opponent was Sir David Home of Wedderburn.

<sup>103</sup> C.S. 5/35 fol. 73r: 4 July, 1525.

<sup>104</sup> C.S. 5/33 fol. 32r: 20 November, 1522.

<sup>105</sup> C.S. 6/1 fol. 114v: 12 September, 1532.

<sup>106</sup> *Prot. Bk. Young*, no. 961: 26 October, 1497.

<sup>107</sup> On Seton, see chapter seven.

## Substitution

The most important additional power granted to a procurator was the power to substitute others to act in his place. Theoretically a substitution differs little from a constitution, apart from the obvious, yet fundamental, fact that in a constitution the formal act is carried out by the principal and in a substitution it is carried out by the principal's mandated nominee [i.e. the procurator]. It was possible for a principal to transmit the *potestas substitutendi* to his procurator in the mandate. In this way substitutes might be given the power by a procurator to name their own substitutes without recourse to the principal. The only case in which such a power was conferred, however, involved a foreign principal who remained abroad when the substitution took place. This case is certainly exceptional. But once the lords conceded the point that such transmission was possible, there appears to be no reason why it could not proceed with a domestic litigant although it may be that the need for it never arose. Even in the one case when the power was conferred, it does not seem to have been used. There is therefore no recorded example of a procurator's procurator's procurator appearing before the lords. Nor, it is submitted, would such a tenuous link between the litigant and the court practitioner have been considered desirable by either.

It may be that acts which were recorded as straightforward constitutions were in reality substitutions. But normally the wording indicates that the procurators named were made by the party who 'comperit' (compeared). Although in some cases this was a fiction, the very fact this word was used would seem to rule out the creation of a substitute by the procurator of some absent principal. It suggests that, even if the

litigant was not present in person, he was the one directly naming the procurators. It is certain the clerks would not have neglected to make a distinction of such potential importance. Substitution significantly dilutes the relationship between litigant and man of law. It is impossible to assess the extent to which a procurator had discretion in selecting substitutes to act for his principal. In one case, it was specifically stated that the procurators named had power to substitute only Master Adam Otterburn.<sup>108</sup> More generally it is probably the case that the procurator, rather than the principal, was in the better position to judge the quality of court practitioners once he arrived in Edinburgh. In the sample of 1138 constitutions recorded between 1504 and 1535 some 29% of them (331) included a '*cum potestate substitutendi*' clause.<sup>109</sup> However, the potential flexibility this gave to procurators seems to have been more apparent than real: the same sample demonstrates that the power to substitute was exercised only on eleven occasions.<sup>110</sup>

Those naming substitutes were the procurators of abbeys of Melrose and Culross, the burgh councils of Aberdeen and Peebles, foreign merchants in Antwerp and Lille and parishioners in Kilmarnock. There was also a son who named substitutes as procurators for his father, and what may have been a brother who did so as procurator for his sister, while in two cases a procurator made a substitution on behalf of women with whom he had no obvious familial connection. In the majority of these cases the

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<sup>108</sup> 4 December, 1506: C.S. 5/18/2 fol. 15r.

<sup>109</sup> See appendix 1.

<sup>110</sup> The dates and references of these are as follows: C.S. 5/18/1 fol. 120v (23 February 1506); C.S. 5/18/2 fol. 14v (4 December 1506); C.S. 5/18/2 fol. 54v (16 December 1506); C.S. 5/19 fol. 17r (30 November 1507); C.S. 5/19 fol. 37v (10 January 1508); C.S. 5/19 fol. 119v (26 January 1508); C.S. 5/20 fol. 172v (26 April 1509); C.S. 5/21 fol. 4r (25 October 1509); C.S. 5/21 fol. 144v (16 February 1510); C.S. 5/37 fol. 218r (26 August 1527); C.S. 5/41 fol. 82v (22 May 1530).

principal was either a corporation or was resident abroad and so was physically unable to appear in person. The extreme difficulty faced by a man of law in communicating with a distant client was exemplified in 1557 when the advocate David Borthwick had to communicate via an intermediary with his client, the exiled earl of Huntly, who was in France.<sup>111</sup> In a case in 1544 the advocate George Strang produced a procuratory which had been subscribed by John Chatellier in Antwerp some three years previously.<sup>112</sup>

Litigation involving foreigners was privileged and not uncommon although for obvious reasons it tended to involve spuilzie of ships, and other merchant goods, and actions of debt. One such action involved merchants from Avignon who, seeking payment of a debt of £500, named Raphael de Cassanyes as their procurator. The letter by which they did so was questioned in court on the basis that there was no way to verify the authenticity of its seal nor the status of the notary who drew it up. Despite these objections the lords allowed the letter provided Raphael found caution *de rato*.<sup>113</sup> Raphael did not name substitutes. Instead he appeared personally in court together with Robert Leslie as his forespeaker.<sup>114</sup> The case began to be heard in 1533 but was not finally settled until an arbitrated settlement was reached in December 1537.<sup>115</sup> Since Raphael did not make substitutes, it seems likely that he remained in Scotland for much of this period, especially since he appeared again before the lords

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<sup>111</sup> C.S. 6/29 fols. 38r-v.

<sup>112</sup> C.S. 6/28 fol. 12v; 27 March, 1544. This is one of the few procuratories which, for some reason, crept into the *acta* despite the book of procurations created in 1534.

<sup>113</sup> C.S. 6/3 fol. 203v; 6 February, 1533 and C.S. 6/4 fol. 6r; 14 February. Cf. The mandate given by Cornelia Haliburton to her husband James Henryson, under the common seal of Antwerp and signed by a local notary: C.S. 6/5 fol. 197v. This was not challenged.

<sup>114</sup> C.S. 6/6 fols. 188r, 190v, 202r-v.

<sup>115</sup> (S.R.O.) N.P. 1/2A fols. 81v-82r (*Prot. Bk. Thos. Keane*): 1 December 1537.

in December 1535.<sup>116</sup> Ultimately he recovered 550 merks which might be viewed as slim reward for the time and effort involved.

### Payments to men of law

Unlike some other civil jurisdictions, such as that of the *Grand Conseil de Malines* or the *Conseil Provincial de Namur*, the lords of council in Scotland did not produce an official scale of remuneration for the advocates who appeared before them.<sup>117</sup> A royal commission which did suggest the regulation of advocates' fees, in 1670, leading to their introduction by act of parliament in 1672, provoked a major conflict between the Faculty of Advocates and the judges who, acting on royal instructions, sought to impose an oath on advocates that they would accept no more than the prescribed fees.<sup>118</sup> This led to a withdrawal of cooperation by a number of advocates in 1670 and, although this short 'strike' was unsuccessful, so abhorrent was the concept of prescribed fees that the legislation was rescinded in 1681.<sup>119</sup> In the absence in the sixteenth century of a Scottish equivalent of the Burgundian *ordonnance de Thionville* of 1470, it would only be possible to reconstruct the level of fees charged if contracts and receipts of payment survived in abundance. But such deeds had no permanent significance and very few have survived.<sup>120</sup> Disputes concerning legal fees and

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<sup>116</sup> C.S. 6/7 fol. 42v: 11 December, 1535.

<sup>117</sup> A. Wijffels, 'Avocats et procureurs', 11; Vael, 'Conseil provincial de Namur', 3-19. Both of these are provisional reports; the final version is awaiting publication. The earliest known fee schedule was promulgated in the Sicilian chancery in the thirteenth century: Brundage, 'Profits of the Law', 12. In Scotland, at least during the reign of James IV, writers to the signet did operate according to a fixed rate of charges: Hannay, *College of Justice*, 312.

<sup>118</sup> Simpson, 'Advocates', 168-171.

<sup>119</sup> Simpson, *ibid.*, 171; Rae, 'Advocate's Library', 8.

<sup>120</sup> There is certainly nothing approaching the importance of the *ricordanze*, in which the late fourteenth century Florentine lawyer Ricciardio di Francesco del Bene recorded his daily income (Martines, *Lawyers and Statecraft*, 103); nor is there even anything as useful as the English Fastolf MSS., which give the accounts of several cases detailing how and by whom legal costs were incurred

pensions are also disappointingly rare.<sup>121</sup> Scots men of law appear to have taken to heart the canonist advice to make sure of the fee before acting, to avoid as much as possible the need of going to law over it.<sup>122</sup> A more general survey of sources is therefore required even to lay the groundwork for inquiry into this issue.

The obvious places to look for evidence of payments made to legal representatives are the records of ecclesiastical foundations. Unfortunately evidence from such sources is limited. It would appear, however, that abbeys such as Arbroath and Dryburgh did retain leading men of law to represent them. The basic terms of appointment were simple. In return for an annual pension, the advocate was bound to give the abbey his best counsel and advice when required to do so. This would have involved the obligation to act generally as procurator for the abbot and convent in all cases and against all persons except any kinsman of the advocate or anyone to whom he had come under a prior obligation. These were the terms upon which it was agreed in 1532 that John Lethame was to act for the abbey of Coupar Angus in return for a pension of ten pounds yearly for the rest of his life.<sup>123</sup> Good evidence of this type of obligation also comes from the abbey of Arbroath. In 1509, the abbot entered into an obligation

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(Ives, *Common Lawyers*, 320). In terms of ecclesiastical lawyers, a list of fees was recorded in late fourteenth century York: Dorothy M. Owen, 'Ecclesiastical Jurisdiction in England 1300-1550', in (ed. D. Baker) *Studies In Church History*, vol. 11 (Oxford, 1975), 215; and a very interesting bill of cost survives from 1439: Dorothy M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission* (Cambridge, 1990), 28-9. Nothing similar exists in early sixteenth century Scotland.

<sup>121</sup> Cf. The early attorney in England, knowledge of payments to whom normally survives only where relevant to a dispute between lawyer and client: Brand, *English Legal Profession*, 91.

<sup>122</sup> Brundage, 'Profits of the Law', 10, quoting William of Drogheda (d. 1245): '[i]t is better to take pains about the fee than to go to law over it'. The same sentiment was expressed in thirteenth century practitioners' manuals. Cf. Sayers, *Papal Judges Delegate*, 222. Medieval legists however, did not recommend actual payment in advance as this was considered unethical: Brundage, *ibid.*, 4-5. Moreover, agreeing fees in advance did not always prevent subsequent legal action as a last resort; numerous *causa salarii* were recorded in the English church courts: Helmholz, 'Ethical Standards', 47.

<sup>123</sup> *Regr. of Cupar Abbey*, I, 312: 18 July, 1532.

with James Henryson, king's advocate and justice clerk general, by which the latter was to give his '*optimum consilium*' to the abbey, and to advocate on its behalf, in return for a life pension.<sup>124</sup> Broadly similar terms were used in the agreement between Robert Leslie and David Beaton, Abbot of Arbroath, in 1527; Leslie was to act generally except against those to whom he was previously engaged.<sup>125</sup> Henryson was to receive forty merks and Leslie the lesser sum of ten pounds, although in neither case are precise details given what this was intended to cover. Certainly Henryson did include the stipulation that if he was required to leave Edinburgh on abbey business he should receive extra expenses to cover this.<sup>126</sup> David McGill, who like Henryson went on to become king's advocate, was in receipt of a pension of twenty pounds annually from Dryburgh abbey in the 1550s and 1560s although unfortunately nothing is known of the terms upon which it was held.<sup>127</sup> Likewise in 1558 when he was also granted a life pension from the commendator of Holyrood payment of which consisted of money and the teinds of the lands of Gorgie.<sup>128</sup> Leading men of law were retained elsewhere to act for abbeys, such as James Foulis for the abbey of Balmerino, and Thomas Hamilton and later John Lethame for the abbot and convent of Lindores.<sup>129</sup> Nothing is known of the terms on which they did so, or the pensions, if any, which they received.

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<sup>124</sup> *Arbroath Liber*, ii, 388.

<sup>125</sup> *Arbroath Liber*, ii, 474.

<sup>126</sup> Roman and canon law sources were explicit in acknowledging that lawyers were entitled to expenses: D. 3.3.46.4-6 (Gaius). According to Brundage, charging for additional expenses was an obvious means of circumventing strict fee schedules, as was establishing a separate schedule for *consilia*, or formal opinions: 'Profits of the Law', 13.

<sup>127</sup> *Dryburgh Liber*, 51, 352, 401.

<sup>128</sup> *Laing Chrs.*, No. 693.

<sup>129</sup> See Appendix 2.



The surviving accounts of the chamberlain of St Andrews indicate yearly payments made to procurators fiscal both in Edinburgh (appearing before the official of Lothian) and St Andrews (appearing before the official principal). Thomas Kincraigie, the procurator fiscal in Edinburgh, received £13 6s 8d yearly, at four terms in the year coinciding with the church festivals of the Invention, St Peter's Chains, All Saints and the Purification.<sup>130</sup> His colleague in St Andrews, Hugh Wishart, received ten pounds in two yearly instalments at Whitsunday and Martinmas.<sup>131</sup> This is more in line with other men of law; normally these were the two terms for payment of fees and pensions. Thomas Marjoribankis also features in these accounts, but it would seem that he does so mainly for his mercantile activity.<sup>132</sup>

The retention of advocates by burgh councils is also well attested particularly in mid-century.<sup>133</sup> The three assessors of the burgh of Edinburgh, Thomas McCalzeane, Robert Heriot and John Spens, received forty pounds between them from 1554 onwards. This yearly pension was again paid in two equal instalments. It is clear from the burgh treasurer's accounts that additional payments might be made for specific actions performed by the assessors. Thus in 1555 McCalzeane received sixteen pence for making two protests before the privy council on the burgh's behalf.<sup>134</sup> But no additional payment appears to have been made a few years later to another assessor,

<sup>130</sup> *St Andrews Rentale*, 95, 107, 121, 137, 176, 197, 209.

<sup>131</sup> *Ibid.*; Ollivant, *Court of the Official*, 55.

<sup>132</sup> M.H.B. Sanderson, "'Kin, Freindis and Servandis': The men who worked with Archbishop David Beaton", *J.R.*, (1974), 45.

<sup>133</sup> The concept of the corporations, such as burghs and religious foundations, using accredited ('attitres') advocates is replicated on the continent: Wijffels, '*Avocats et procureurs*', 7; Martines, *Lawyers and Statecraft*, 103. It clearly derives from practice in the church courts, where corporate institutions such as monasteries used procurators to represent them: Sayers, *Papal Judges Delegate*, 224.

<sup>134</sup> *Edin. Accs.*, 135.



Richard Strang, when he was ordered to ride to Stirling to ‘ressoun with the Quenis maiestie’ on the burgh’s behalf, although he did at one stage receive eight pence for making or obtaining ‘instruments in the tailzeares and broudstars matters’.<sup>135</sup> McCalzeane initially appears to have been the most active of the three assessors. Although he was formally replaced as an assessor by Robert Crichton in November 1556, after being suspended for using intemperate language towards Mary of Guise, his removal from office was short-lived. The Regent may have relented, or McCalzeane’s objection to the legality of his removal may have been upheld, but whatever the reason, the following year he received payment in respect of the Whitsunday term 1557, when he was supposedly suspended. Not only did the council pay him, but they gave him twice what they had undertaken to pay Crichton.<sup>136</sup> Perhaps as a means of spreading experience of handling the burgh’s legal affairs amongst its leading burgesses, Edinburgh, although generally maintaining three assessors, varied the membership of the group. David Borthwick and Richard Strang joined McCalzeane in 1562, each receiving ten pounds yearly to act as assessors for the burgh at the will of the council.<sup>137</sup> Two years later, Strang, Alexander Sym and John Shairp received a like amount for performing the same task.<sup>138</sup> In addition to the assessors John Moscrop was, prior to the Reformation, appointed the burgh’s procurator fiscal, receiving in return the right to bring wine into the burgh for his own use free of customs charges.<sup>139</sup> He was charged with pursuing and defending actions relating to the burgh before all judges and he performed a similar function as the

<sup>135</sup> *Edin. Burgh Recs.*, iii, 172; *Edin. Accs.*, 135.

<sup>136</sup> *Edin. Burgh Recs.*, ii, 255; *Edin. Accs.*, 205-6.

<sup>137</sup> *Edin. Burgh Recs.*, iii, 153.

<sup>138</sup> *Edin. Accs.*, 460.

<sup>139</sup> *Edin. Burgh Recs.*, iii, 28; C.P. Finlayson, *Clement Litill and His Library*, (Edinburgh, 1980), 7.

procurator for the burgh of Ayr who, in return for his services, received a fee and occasional gifts of herring.<sup>140</sup>

In 1548, by way of a bonus for good deeds done in the past on its behalf, Aberdeen burgh council ordered that a ‘puncion’ of good wine be delivered to the advocates Robert Carnegie and Thomas Marjoribankis. The provost and bailies also determined to visit them and thank them personally by offering them such additional ‘humanities’ as they thought appropriate.<sup>141</sup> However the burgh does not appear to have retained permanent counsel. In 1562 it sent a man south with six pounds to be paid to the advocate David Borthwick in return for defending the burgh in an action brought by William Forbes.<sup>142</sup> In 1527 the provost of Aberdeen was empowered to travel to Edinburgh to substitute advocates to act on the burgh’s behalf and a similar expedition was made in 1557.<sup>143</sup> In this respect Aberdeen was doing precisely the same as Danzig, where the council in 1556 constituted a procurator, Hallibrand Lasar, to represent some of his fellow citizens in litigation in Scotland.<sup>144</sup> Of course, a Scot representing a foreign council might be faced with a conflict of interest especially if he himself belonged to a Scottish burgh. In 1526 James Foulis, acting as prelocutor for Cornelius Bertilson, procurator for the burgomeisters of Middleburg, protested that since he was sworn to the freedom of Edinburgh he would involve himself in nothing that might prejudice the common weal of merchants in the realm of Scotland.<sup>145</sup> In the purely domestic sphere, lawyers might even be consulted on the legal aspects of burgh

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<sup>140</sup> M.H.B. Sanderson, *Ayrshire and the Reformation*, (East Lothian, 1997), 7.

<sup>141</sup> *Aberdeen Council Register*, I, 263.

<sup>142</sup> *Ibid.*, I, 346.

<sup>143</sup> C.S. 5/37 fol. 218r; *Aberdeen Council Register*, 294-5.

<sup>144</sup> (S.R.O.) R.D. 1/1 fol. 392a.

<sup>145</sup> C.S. 5/36 fol. 45r: 14 July, 1526.

politics. In 1554 one of the bailies of Haddington was sent to Edinburgh to consult with men of law on what to do about James Oliphant, who was refusing to accept the office of provost.<sup>146</sup>

Burgh assessors of necessity were burgesses. But they were not the only lawyers who enjoyed that status. Many leading lawyers were involved in trading activity in some cases to supplement income and, in others, probably as a major source of income. The assessor Thomas McCalzeane arranged to buy gunpowder for the council and also sold ammunition to it.<sup>147</sup> Lawyers who were also burgesses were of course well placed to make connections and they can often be found engaged in trading ventures and money-lending. Richard Lawson used his connections with the continent to import numerous law texts.<sup>148</sup> In 1527 the earl of Cassillis acknowledged that he was three hundred merks in debt to the advocate Adam Otterburn; a debt he could not repay.<sup>149</sup> Otterburn also appears to have acted in the capacity of debt-collector on one occasion for George Shaw of Knockhill.<sup>150</sup> In 1555 Patrick Hamilton acknowledged an even larger debt, a thousand pounds Scots, to the advocate Thomas Marjoribanks.<sup>151</sup> Leading lawyers who were also burgesses featured heavily at the foundation of the College of Justice in 1532 and their importance will be discussed in the next chapter. A less significant man of law, the Edinburgh burgess and sometime judicial procurator Master Thomas Strachan, does however provide rare detail in his protocol

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<sup>146</sup> (S.R.O.) G.D. 1/413/1 (Haddington Burgh Court Book, Transcript): 9 November, 1554.

<sup>147</sup> *Edin. Accs.*, 229-30, 253.

<sup>148</sup> Cosmo Innes (ed.), *The Ledger of Andrew Halyburton 1492-1503*, (Edinburgh, 1867), 273. Not only lawyer-burgesses engaged in money lending. Master Thomas Couttis, canon of the chapel royal and official of Lothian, brought an action to recover £30 of 'lent money' from James Scrimgeour of Dudhope in 1526: C.S. 5/36 fol. 126r: 7 December, 1526.

<sup>149</sup> C.S. 5/37 fol. 73r: 1 April, 1527.

<sup>150</sup> C.S. 5/38 fol. 108v: 25 May, 1528.

<sup>151</sup> (S.R.O.) R.D. 1/1 fol. 369.

book of the method by which he was paid to represent Alexander Jardine of Lauder in his action against Thomas Fawside.<sup>152</sup> In a memorandum, Thomas noted that Alexander had:

‘promittit me xl s[chillingis] for my labouris in the pley...of the quhilk I have gottin xvi s[chillingis] the condicioun was the tane half to be payit in hand & the tothir half at the end of the pley nayn p[rese]nt bot he & I Item payit thireftir iiii s[chillingis]’.<sup>153</sup>

This is a chance survival and there is no indication anywhere else of such terms of payment being used and therefore no way of telling how representative this is. Clearly the terms were agreed in advance between lawyer and client, no one else being present. Part payment was made and an additional payment was later added to meet the initial obligation of the litigant to pay half of the fee in advance.

Although many lawyers were undoubtedly wealthy, in the absence of testaments or tax records prior to 1550 it is impossible to know exactly how wealthy they were or how they stood in comparison with others. The testaments of lawyers active before the Reformation which do exist tend to come from the 1570s and 1580s and are too late to be of value in assessing their earlier income.<sup>154</sup> Although the leading advocates in the College of Justice were normally immune from burgh taxation, the Edinburgh tax roll of 1565 does include lawyers because it was the result of an extraordinary tax

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<sup>152</sup> In the protocol book the name ‘Thomas’ has been scored out and replaced by the name ‘Henry’. No ‘Henry’ is recorded as ever having been constituted as a judicial procurator, whereas Master Thomas Strathauchin was constituted on several occasions at around this time. It therefore seems sensible to suggest that the notary may have been Thomas, rather than Henry.

<sup>153</sup> (S.R.O.) B. 22/1/9/ fol. 6: 27 September, 1508.

<sup>154</sup> For example, John Spens died in 1574: (S.R.O.) C.C. 8/8/6 fols. 54v-55r; James McGill died in 1579: (S.R.O.) C.C. 8/8/11 fols. 146v-152r; David Borthwick died in 1581: (S.R.O.) C.C. 8/8/10 fols. 239v-241v. The testament of Henry Lauder (d. 1560) does not survive although an entry exists relating to debts which were left out of his confirmed testament: (S.R.O.) C.C. 8/8/1 fols. 66v-67r. These shed no light on his legal activities.

imposed to raise a loan to purchase the superiority of Leith.<sup>155</sup> The amount raised from ‘men of law and scribes’ was £1, 156 13s 4d, some two hundred pounds more than was raised from all of the crafts combined. The list is interesting for two main reasons. First, the lawyers were assessed individually as lawyers and not as merchants. Secondly, both advocates and scribes as individuals were assessed at high levels in comparison with most merchants; and the assessment of the leading advocates was considerably in excess of any demand made upon merchants.<sup>156</sup>

In the event of a client’s refusal to pay, the advocate could rely on the obligation and recover whatever was due to him for his services.<sup>157</sup> This principle, certainly established early in the history of the College of Justice, was mentioned by Balfour who quoted two cases as authority for it.<sup>158</sup> Only one of these cases has been traced. This involved Henry Spittall who brought an action against John Cummyng seeking payment of arrears of twelve pounds.<sup>159</sup> The obligation entered into by John specified that he would pay Henry four pounds in two annual instalments, in return for Henry’s ‘counsale and advocatioun in his materis before the lordis of counsale quhen he suld be requirit’. Presumably the obligation was made in 1528 because it specified that it was to last for three years ‘nixt and immediatlie precedand’ 19 March 1532. Without further surviving examples there is no way of knowing whether such a limited term

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<sup>155</sup> Lynch, *Edinburgh and the Reformation*, 373.

<sup>156</sup> David Borthwick, George Crichton, Thomas McCalzeane and John Moscrop were assessed at £100 each. The highest assessment for any individual merchant was £60.

<sup>157</sup> In contemporary England, it was the usual practice of serjeants in the sixteenth century to require payment in advance for legal advice and it was rare for them to sue over the matter: J. Baker, ‘Counsellors and Barristers’, *Cambridge Law Journal*, (1969), 210. In Scotland, the law regarding advocates’ fees changed after Balfour and it became the rule that advocates could not sue for their fees. This was re-stated in *Batchelor v Pattison and Mackersy* (1876) 3 R. 914.

<sup>158</sup> *B.P.*, ii, 300.

<sup>159</sup> C.S. 6/2 fol. 59v; *Selected Cases from Acta Dominorum Concilii et Sessionis 1532-33*, (ed.), I.H. Shearer, (Stair Society, 1951), case no. 108.

agreement was unusual. Spittall does not appear to have wasted much time in resorting to legal action in pursuit of the debt although he did wait until the period specified in the agreement was complete.<sup>160</sup> Although an action such as this would not yet have been privileged in 1533, and would have had to run its course like any other ordinary action, it is unusual in that of all the possible stages in the process, only the decret is given. Conceivably that is all there was; the lords may have been persuaded by Spittall's evidence, as well as by his standing as one of the advocates of the council, to grant an immediate order in his favour. There is no evidence that Spittall entered correspondence with his reluctant client although this seems likely. Half a century later, the advocate John Russell sent a letter to his wayward client, Sir Patrick Waus, urgently reminding him of his obligation and subtly hinting at legal action.<sup>161</sup>

Arbitration afforded a less confrontational means of resolving a dispute with a client than raising an action.<sup>162</sup> A notarial instrument recorded in 1533 narrates a decret arbitral by Alexander Milne, Abbot of Cambuskenneth and the first Lord President of the College of Justice, and Master George Scougal, in disputes between the advocate Adam Otterburn and Andrew Murray of Blackbarony. At least part of the dispute seems to have involved payment for legal advice as Andrew became bound to pay 200 merks to Adam for food and drink for him and his servant for five years, '*ac pro*

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<sup>160</sup> Presumably he waited in order to sue for the whole debt. Personal obligations did not prescribe for forty years and so negative prescription was not a factor in his decision to bring a relatively quick action.

<sup>161</sup> Russell's letter was successful in obtaining payment of most of the debt. It is interesting that in relation to the sum outstanding, another advocate, David Reid, agreed to retain custody of a gold chain belonging to Waus as security for payment: *Correspondence of Sir Patrick Waus of Barnbarroch, knight*, (ed.) R.V. Agnew, (Edinburgh, 1887), II, 430-432. Cf. Brundage, 'Profits of Law', 12.

<sup>162</sup> In the context of thirteenth century England, many cases brought by sergeants for arrears of pensions did result in litigation but were often settled out of court: Brand, *Origins of the English Legal Profession*, 100.

*consilio labore et industria dicte magistri adami* in connection with Andrew's lands and leases.<sup>163</sup> It is possible that Robert Leslie was also involved in a dispute with his client Hector Bruce although the matter did not go the length either of legal action or arbitration.<sup>164</sup> Bruce had constituted him his procurator to represent him in an action against Lord Ruthven and William, Master of Ruthven. Although Leslie did appear as instructed, at one stage Robert Bruce, a burgess of Edinburgh and presumably a kinsman of Hector, compeared and undertook to pay Leslie and to fulfil all conditions which he had made in return for the latter's 'labouris besyness and procuratiounis' in the dispute. Robert Bruce seems to have entered into a separate agreement to remunerate Leslie on Hector's behalf, probably acting as his cautioner. This might have occurred because Hector himself experienced difficulty in meeting his obligation. An interesting point is that payment was to be made to Leslie or to his assignee. Such an arrangement is not found where annual pensions are paid. Where a special constitution was involved, payment could be more flexible since the relationship would be relatively short term (or, at least, so it was hoped). Income from such arrangements might wholly or partly be used by the advocate as a convenient means to satisfy his own debts to others. Pensions, paid for life or for a fixed term of years, and intended to encompass actions generally rather than only particular cases, were invariably paid only to the advocate involved and not his assignees. It is

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<sup>163</sup> (S.R.O.) G.D. 32/6/9 (Viscounts and Barons of Elibank): 20 July, 1533.

<sup>164</sup> C.S. 5/37 fol. 88r: 4 April, 1527. A dispute in 1541 between the advocate Andrew Blackstock and William Cockburn of Scraling resulted in Andrew obtaining 20 merks by the judgement of the official of St Andrews. This may have been in respect of legal fees incurred in the church court where Andrew was most active (Ollivant, *Court of the Official*, 61). The dispute came before the lords of session after Andrew seized goods (including a Parisian-made velvet gown) belonging to William in satisfaction of the debt: C.S. 6/14 fol. 103v.



sometimes difficult to tell, however, whether an advocate who was suing over a debt was seeking payment of sums owed in respect of legal services.<sup>165</sup>

Master John Lethame, the only advocate for whom receipts survive, subscribed them sometime after the date the pension was due indicating he was prepared to wait at least a month or two for his money. Three of these receipts survive, all made out to servants acting for the earl of Cassillis, and all specifying different amounts. In the Whitsunday term 1518 he received five crowns.<sup>166</sup> In the Martinmas term 1522 he was given fifty shillings.<sup>167</sup> Earlier that year, in July, he also gave a receipt for either four pounds or five pounds (both figures are mentioned) in full payment 'of all tymes bipast before the dait of this my acquittance'.<sup>168</sup> Presumably this was in respect of the preceding year and, taken with the payment recorded for the Martinmas term, would indicate a pension of five pounds *per annum*.

The type of obligation also varied. As well as the straightforward indenture, bonds of manrent and maintenance might be used to link the man of law with his client. The justice clerk, Richard Lawson, also a judge, ambassador and man of law, bound himself in 1501 to the earl of Errol and his apparent heir by his bond of manrent. He promised to give them the 'best and trewast consall I can without disimulation in all caussis querellis and actionis mowit or to be mowit be thaim or at concernis to thaim

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<sup>165</sup> For example, in 1505 David Balfour of Careston sought payment of 11 merks 5s 4d from John Moutrie, brother of the late Thomas Moutrie of Markinch, which he alleged the latter was wrongfully withholding from him. There is no indication of how the debt was incurred: C.S. 5/16 fol. 127v: 21 February, 1505.

<sup>166</sup> (S.R.O.) G.D. 25/1/242 (Ailsa Muniments):23 July, 1518. Five crowns were worth 100s (i.e. five pounds).

<sup>167</sup> (S.R.O.) G.D. 25/1/261: 9 December, 1522.

<sup>168</sup> (S.R.O.) G.D. 25/1/254: 10 July, 1522.



or againnis (sic) thaim'.<sup>169</sup> In 1509 an indenture was made between Robert, Lord Erskine and Adam Otterburn, by which Adam agreed to be:

'advocat and procurator for the said lord In all & sindry his actiounis spiritual and temporall lefull & honeste agane qhatsumever persone exceptend the personis to quham he is oblist of befor And sall gif to the said lord the best truth and afald consile he can in all his actiounis quhen he beis requirit thairto'.<sup>170</sup>

As Henryson had done in his agreement with Arbroath abbey, Otterburn, another burgess of Edinburgh, specified that should he be required to leave the burgh to advocate, procure or even counsel Erskine, that his expenses should be met. This was over and above the eight merks to be paid yearly, in two equal instalments, so long as both parties lived.<sup>171</sup> A generation later George Crichton, Bishop of Dunkeld, issued letters of maintenance to Thomas Bellenden, advocate and future justice-clerk, who in return bound himself in manrent to the bishop.<sup>172</sup>

The evidence is too fragmentary to permit a clear picture to emerge of precisely what the client was paying for. In return for his money he could certainly expect legal advice whenever he required it; but he could not always expect legal representation.<sup>173</sup>

An advocate might, by prior obligation, find himself bound to represent an opponent and this was written into the agreement from the start. It is clear that pensions varied

<sup>169</sup> *Spalding Club Miscellany*, ii, 278; (S.R.O.) NRA(S) no. 925, no. 167.

<sup>170</sup> (S.R.O.) G.D. 124/7/10 (Mar and Kellie Muniments): 6 July, 1509.

<sup>171</sup> Robert, lord Erskine named Otterburn as his procurator on two constitutions recorded in the *acta*, on 29 March and 28 July, 1511: C.S. 5/22 fol.101v, C.S. 5/23 fol. 72r. The first constitution was special and general (against Alexander Barclay and all others), the second was general. There is no recorded constitution of Henryson by Arbroath abbey, or of Bellenden by the bishop of Dunkeld.

<sup>172</sup> HMC 14<sup>th</sup> Report (MSS. Of the Duke of Roxburghe), part III, 42; (S.R.O.) NRA(S) no. 1100, Appendix 4, 201: 27 March, 1530.

<sup>173</sup> In Scotland a certain vagueness always attached to the word '*consilium*': J. Wormald, *Lords and Men in Scotland*, (Edinburgh, 1985), 28-32.

in value, probably according to the rank of the client and the likely amount of litigation in which he would be involved. Less regular payments made to advocates have left virtually no trace in the record. There is therefore no way of telling whether the rate of pay for their services varied according to the value of the sum sued for as it did in Florence, for example, where a tariff was set in 1415.<sup>174</sup> On the limited evidence available, it seems that the legal terms of the advocate-client relationship did not greatly vary. In practice, however, it is likely that the expectations of clients differed according to their own knowledge and experience. Litigants with experience of making personal appearances before the lords may simply have been interested in getting the best advice at the appropriate time rather than being represented *in absentia*. The more litigious in society, and those who paid annual pensions to advocates, no doubt hoped to maintain someone in Edinburgh who was active in the council chamber and prepared to serve their interests in any litigation that might directly or indirectly affect them. It is not clear whether Scottish practice was similar to that in England where the payment of an annual retaining fee simply meant that the lawyer was prepared to offer occasional advice and that for pleading he would receive an additional fee.<sup>175</sup> It was certainly the case in both jurisdictions that if the lawyer was required to travel, the client would meet his expenses.

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<sup>174</sup> Martines, *Lawyers and Statecraft*, 100.

<sup>175</sup> Nigel Ramsay, 'Retained Legal Counsel, c.1275-c.1475' (1985) *T.R.H.S.*, 106-7. The word 'counsel' was defined much more tightly in England than in Scotland.

## Ratification and revocation

The final clause in a procuratory was the ratification clause whereby the principal promised to hold 'firm and stable' whatever the procurator did as a result of his constitution. If the principal was a married woman then her husband's consent to the action was legally necessary and he was normally included in the procuratory for his interest.<sup>176</sup> Consent might be indicated by the spouse's subscription of the procuratory and the attachment of his seal.<sup>177</sup> In one case it was objected that Helen Campbell was handfast and betrothed to Thomas Kennedy, and so she had no power to pursue a summons in which his name did not appear for his interest. Helen's procurator, Robert Galbraith, responded by arguing that Thomas was present for his interest and that, besides, 'thai war nocht spousit yit'. The objection was repelled.<sup>178</sup>

Ratification by the litigant was not merely for the benefit of the other party to the action. It also functioned as protection for the procurator. It was the equivalent of a warrandice clause, indemnifying the procurator from loss provided he lawfully followed the 'premises', or instructions, laid down in the letter of procuratory.<sup>179</sup> The principal promised to relieve the procurator 'under the pane and obliſing of al my gudis, movable and immoveable, present and tocum'.<sup>180</sup> In spite of the fact that the

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<sup>176</sup> Rosalind K. Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080-1980*, (London, 1983), 34-5. Henceforth, Marshall, *Virgins and Viragos*.

<sup>177</sup> E.g. Fraser, *Stirlings*, 364.

<sup>178</sup> C.S. 5/34 fol. 110v: 22 February, 1524. In another case, the lords decided that an action against a widow might proceed even though her second husband had not been summoned - C.S. 5/32 fol. 15v: 23 November, 1518.

<sup>179</sup> E.g. *Prot. Bk. Foular*, iii, 26 (no. 71).

<sup>180</sup> E.g. *A.D.C.*, ii, 373; Fraser, *Stirlings*, 364. Cf. '*sub ypotheca et obligatione omnium et singulorum bonorum sourum, mobilium et immobilium, presentium et futurum*': Fraser, *Montgomeries*, II, 92; Fraser, *Wemyss*, II, 183; (S.R.O.) G.D. 20/1/23 (Crawford Priory Collection, 4 October, 1497) and G.D. 25/1/281 (Ailsa Muniments, 17 May, 1527).

ratification clause was standard, there are entries in the *acta* narrating that caution had been found that a procurator's activities would be adhered to by the principal. Caution was often given in the context of husband and wife, with the husband promising 'under the pain of double' that his wife would 'hald ferme and stable' whatever he did on her behalf.<sup>181</sup> Presumably the penalty was double the value of the gain which the other party stood to make if successful in the action. A man acting as procurator for his brother might grant caution on identical terms.<sup>182</sup> It was also possible that a procurator could find another cautioner on his wife's behalf. For instance, William Crichton obtained surety from his brother John that William's wife would stand by what he did on her behalf.<sup>183</sup> Nor did the cautioner have to be related to the principal. Adam Otterburn agreed to act in this capacity, again under 'the payn of doubill', guaranteeing that the widow Margaret Hepburn would abide by the actions of her procurator Master James Johnstone.<sup>184</sup> In a very unusual step for a professional advocate, Robert Leslie agreed to become cautioner for his own client, Patrick Ogilvie of Inchmartin, again 'under the pain of double'.<sup>185</sup> On another occasion, when the chancellor in the name of all the lords promised to pay John Moutrie of Seafeld the sum which he had recovered from the laird of Raith, the laird, and Leslie his procurator, jointly promised to relieve the lords 'be the extensioun of thir handis'.<sup>186</sup>

<sup>181</sup> B.P., 298. For examples, see C.S. 5/29 fols. 109r (18 March, 1517) and 150v (26 March, 1517); C.S. 5/30 fol. 72r (8 July, 1517).

<sup>182</sup> E.g., C.S. 5/29 fol. 147r: 24 March, 1517; C.S. 5/32 fol. 8r: 19 March, 1518.

<sup>183</sup> C.S. 5/34 fol. 73r: 1 February, 1524.

<sup>184</sup> C.S. 5/30 fol. 91r: 16 July, 1518. On the same day, along with others, Otterburn did the same for Sir William Sinclair of Roslin, guaranteeing that Sir William would hold firm whatever Otterburn himself, and the dean of Glasgow, did on his behalf.

<sup>185</sup> C.S. 5/29 fol. 30r: 20 February, 1517.

<sup>186</sup> C.S. 5/43 fol. 169r: 26 February, 1532.

According to Balfour, a procurator under a general mandate could be repelled unless he could find *caution de rato*.<sup>187</sup>

Considering the large number of constitutions that were made there are surprisingly few references in the *acta* to revocations. Yet there is nothing so intriguing in the relationship between lawyer and client as the ending of it. In some cases it is clear that the revocation results from a litigant's decision to give up his action, perhaps because it became clear that he had no chance of winning. The case of John Nesbit of Newton is one example.<sup>188</sup> Having had a summons of spuilzie raised at his instance against William Hay of Tallo, Nesbit renounced the summons, and his action, together with all procurators made in his name for pursuing it. He then admitted that the subjects of the dispute, cows and oxen taken from his land by king's officers, were lawfully taken since William had apprised them. Alternatively, the litigant might change his mind and make a revocation because of a change of circumstances, as in the case of the Englishman John Brady, who 'was content to ansuer himself in the cause' and so revoked his procuratory.<sup>189</sup> The opposite could also happen. James Henryson, 'allegeand him' procurator for Christine Muir, revoked all that her late husband had done on her behalf or that she herself had done.<sup>190</sup> It seems that Christine now wanted the experienced Henryson to represent her but from the wording used there must have been a doubt about the validity of his status. Despite these few examples, it is

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<sup>187</sup> B.P., ii, 299.

<sup>188</sup> C.S. 5/42 fol. 30r: 1 February, 1531.

<sup>189</sup> C.S. 5/23 fol. 103r: 6 August, 1511.

<sup>190</sup> C.S. 5/18/1 fol. 119r: 23 February, 1506.

generally the case that no reason was given when a revocation was made and usually there is insufficient information from which one might even be suggested.<sup>191</sup>

As well as having their authority revoked, it would seem that lawyers could renounce their participation in an action even after it had begun. There appears to be only one example of this and it dates from 1506.<sup>192</sup> James Henryson, in an action concerning a poinding brought by William Keith of Inverugy against Lord Crichton, asked that it be recorded that ‘he rennuncit to be procurator in this mater forsaid & wald nocht further defend it’. Once again, unfortunately, no reason was given. This case is unique in the *acta*, although it perhaps sheds light on a remark made by Robert Galbraith in 1529 that ‘ane procuratory was bot ane office of will’.<sup>193</sup> This appears to mean that the office of procurator was the consequence of a voluntary agreement between litigant and representative, and remained valid only so long as both consented. Although most of the evidence relates to litigants revoking procuratories, the Henryson example does indicate that procurators had a reciprocal right to bring the relationship to an end. This would be in line with the evidence raised earlier that procurators could accept or decline office.<sup>194</sup> The fact that a procuratory seems to have lapsed automatically in certain circumstances also adds strength to this view. Technically, it was said that the procurator was ‘*functus officio*’.<sup>195</sup> There is only one example of the use of this phrase but its circumstances are significant. It was used by James Foulis who had acted for

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<sup>191</sup> E.g., C.S. 5/18/1 fol. 23v where the litigant ‘revokit all that John Fery spake [*sc.* for] him’ against his adversary. Nothing else is given.

<sup>192</sup> C.S. 5/18/1 fol. 187v: 10 March, 1506.

<sup>193</sup> C.S. 5/40 fol. 89r: 6 August, 1529.

<sup>194</sup> In some jurisdictions, such as Malines, this was possible only up to the point of *litiscontestatio*. See, for example, Wijffels, ‘*Avocats et procureurs*’, 10.

<sup>195</sup> C.S. 5/39 fol. 52v.

the abbot of Balmerino in an action which had been submitted to arbitration. The case came back to the lords of session, however, when the other party reclaimed from the decret for an alleged impropriety.<sup>196</sup> By the time the case returned to the lords, Foulis claimed that he was *functus officio*: this could have happened either because of the passage of time, or because once the case was decided by arbitration his original authority lapsed. The latter explanation is more likely; reclamations from arbitration were rare and if the mere passing of time could cause a procuratory to lapse then presumably there would be many more examples of this phenomenon.

The clients least likely to revoke their procurator's authority were those closely related to him. Most of those who very rarely appeared as procurators were doing so because they were appearing for family members. When it comes to the leading professional lawyers however, only in a few cases is it known with certainty that the procurator was appearing for a member of his own family. The ubiquitous lawyer Abraham Crichton, who went on to become official of Lothian, appeared in separate actions on behalf of his father, his grandmother and his nephew.<sup>197</sup> Thomas Scott, later justice clerk, appeared on behalf of Sir William Scott of Balwearie his father.<sup>198</sup> Henry Lauder also appeared on behalf of his father although Gilbert Lauder, sometime bailie of Edinburgh and dean of guild, had himself been no stranger to the courts in previous years.<sup>199</sup> In March 1536, Master Hugh Rigg appeared on behalf of John,

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<sup>196</sup> For more on this case, see chapter six.

<sup>197</sup> C.S. 5/25 fol. 180r; C.S. 5/24 fol. 177v; C.S. 5/32 fol. 130v. He also appeared on behalf of Margaret Crichton, lady Sempill (C.S. 5/33 fol. 133r) and as tutor for John Crichton, son of the late Sir Adam Crichton of Rothiemains (C.S. 5/30 fol. 116v).

<sup>198</sup> C.S. 5/34 fol. 71v: 30 January, 1524.

<sup>199</sup> C.S. 6/7 fol. 124r: 23 February, 1536. Examples of Gilbert appearing personally in his own actions are numerous: e.g. C.S. 5/30 fol. 62r; C.S. 5/31 fol. 117r; C.S. 5/34 fols. 85r, 218r; C.S. 5/35 fol. 216r. As dean of guild, he is mentioned in 1532: C.S. 6/2 fol. 121v.



Thomas and William, the sons of the late John Rigg, a burgess of Dumfries. The case was brought against them by Henry, Bishop of Galloway and commendator of Dundrennane and concerned a tack of lands in Kirkcudbright allegedly made in 1527 by the late abbot of Dundrennane in favour of John Rigg.<sup>200</sup> Hugh's clients were probably his cousins.<sup>201</sup> Master Henry Spittall represented Archibald Spittall in an action against Finlay Spittall concerning the occupation of lands in Menteith.<sup>202</sup> The connection between them is unknown. The same is the case with Master James Simson in respect of his appearance on behalf of Marion Simson, Lady Rossyth, although the family link is clear when he appeared with his brother Michael when the two of them were executors of their late father's estate.<sup>203</sup> More directly, Robert Leslie represented his sister Eufame, William Johnstone his father James, and Robert Galbraith appeared for his father, David Galbraith of Kimmergheame in Berwickshire.<sup>204</sup> This latter court appearance is virtually the only evidence which exists identifying Galbraith's origins.

<sup>200</sup> C.S. 6/7 fol. 147r: 13 March, 1536.

<sup>201</sup> Rigg himself was clearly from Dumfries and became parish clerk of Buthill in Whithorn in 1532: *R.M.S.*, ii, no. 1405. He was a burgess of Edinburgh by right of his wife, Janet Hoppar. Nonetheless he can still be found witnessing transactions as a notary public in Dumfries: e.g. *Prot. Bk. Carruthers*, no. 46 (16 December, 1535). His son, James, was also a notary public acting in Dumfries in the later sixteenth century: *Prot. Bk. Alexander King*, no. 70, (16 January, 1556); Fraser, *Caerlaverock*, ii, 357 (28 January, 1590). Ultimately, Hugh settled in Carberry, Midlothian.

<sup>202</sup> C.S. 5/42 fol. 40v: 9 February, 1531.

<sup>203</sup> C.S. 5/34 fols. 50v, 71r: 21 and 29 January, 1524. James Foulis appeared on behalf of Robert Foulis, a burgess and notary public of Linlithgow. Again there is no indication of how they were related - C.S. 5/35 fol. 154r: 6 November, 1525.

<sup>204</sup> Leslie: C.S. 6/1 fol. 76r; Johnstone: C.S. 5/43 fol. 80r: 17 November, 1531; Galbraith: C.S. 5/30 fol. 120v: 28 July, 1517; C.S. 5/32 fol. 32r: 30 November, 1518. See also other references given in chapter 5.



## Legal services

Mention has already been made of references to the counsel and advice which lawyers bound themselves to give to their clients. In the case of major magnates, such advice might be given within the context of the baronial council.<sup>205</sup> In comparison with England very little is known about such councils, or their place in wider magnatial affinities, in Scotland.<sup>206</sup> In 1527 John Moutrie of Seyfield offered to give himself in judgement to his overlord, the earl of Morton, and 'his weile avisit consale'.<sup>207</sup> Morton's regular advocate was John Lethame and it would require no leap of imagination to assign to him an important role in this council. Yet despite the odd tantalising reference, little trace survives of the activities which lawyers performed on behalf of their clients outwith the courts.

Certainly leading advocates do appear as procurators *de negotia*, carrying out important legal transactions. Those who were also notaries can be found drafting documents. John Lethame is only one significant example, while James Henryson and Adam Otterburn became successive town clerks of Edinburgh, using to advantage their burgess status.<sup>208</sup> But as well as drafting documents, advocates were often called upon to advise on the content of important deeds to ensure their legal efficacy. This required some skill. One bond that was registered in the *acta* confidently narrated that

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<sup>205</sup> Kelham, *Magnatial Power*, 24.

<sup>206</sup> On the council learned in England, see Carole Rawcliffe, 'Baronial Councils in the Later Middle Ages', in (ed. C.D. Ross) *Patronage, Pedigree and Power in Later Medieval England* (Gloucester, 1979), 90. The high point of the notion of the council was probably Henry VII's famous 'council learned', extant from about 1500 to 1509. Of the twelve known members of this '*consilium domini regis in lege eruditum*', ten were legally trained: S.B. Chrimes, *Henry VII*, (London, 1977), 151.

<sup>207</sup> C.S. 5/27 fol. 91r: 5 April, 1527.

<sup>208</sup> See chapter eight.

it had been made 'in the maist strate form & sicker (secure) stile of obligatioun that can be divisit but fraud or gile na remeid of law cannoun civile municipale or utheris quhatsumevir to be proponit in the contrar'.<sup>209</sup> This was not merely a matter of form: ensuring the security of an obligation would in many cases demand the involvement of men of law. To take two not unconnected examples: debt and marriage. Juggling debts might require the expertise of an experienced lawyer. In negotiating a contract by which he hoped to relieve some of his debts, Lord Home promised the other party that he would cause his son Alexander 'to mak quhat securite that men of law will devise'.<sup>210</sup> In one case James Hering, who as the assignee of Robert Ferguson was owed money by the abbot of Dunfermline, promised to give the abbot a discharge for the debt provided the abbot caused three named individuals to bind themselves to make payment of the amount owed. This he did according to the advice and information of the man of law Richard Lawson.<sup>211</sup> Even more complex than debt negotiation were marriage contracts. This was especially the case since they were often made considerably in advance of the marriage and had to take into account numerous variables, such as the value of the tocher and terce, the consequences of non-fulfilment, or the possibility at any stage of impediments to the marriage being discovered.<sup>212</sup> A good example is the contract arranged in 1544 between William, Earl Marischall and George, Earl of Errol.<sup>213</sup> The Marischall's eldest son was to marry the eldest daughter of the late earl of Errol when he reached the age of fifteen. The new earl of Errol was to be infeft in certain lands within forty days as security for the

<sup>209</sup> C.S. 5/33 fol. 200v: 18 June, 1523.

<sup>210</sup> C.S. 6/8 fol. 162v: 12 August, 1536.

<sup>211</sup> *Prot. Bk. Jas. Young* no. 160: 3 February, 1489.

<sup>212</sup> On marriage contracts, see Marshall, *Virgins and Viragos*, 28-31, 74ff.

<sup>213</sup> (S.R.O.) NRA(S) no. 925 (Errol Charters): 14 January, 1544.

marriage going ahead and he was to give up those lands on completion of the marriage. Other financial details were arranged, including who was to pay in the event that a papal dispensation had to be obtained. Finally, it was agreed that if the contract proved not to be secure, it was to be 'reformed' with the advice of at least three men of law out of five who were named. Those named were Hugh Rigg, Thomas Marjoribankis, James McGill, Henry Lauder and Thomas Wemyss.

## Chapter Three

### 1532 Part One: The Prosopography of Procuration

‘Item...that thir be ane certane nomer of advocatis and procuratouris to the nomer of tene personis that salbe callit general procuratouris of the counsall, of best name, knowlege and experience, admittit to procure in all actiounis...maister Robert Galbraith, maister Robert Leslie, maister Henry Spittall, maister Johne Lethame, maister Henry Lauder, maister Thomas Kincraigie, maister Thomas Marjoribankis, maister William Johnston...’<sup>1</sup>

At the foundation of the College of Justice in May 1532 the king expressly delegated power to the Chancellor and the lords of session to ‘avise, counsell and conclude upon sic rewlis, statutis and ordinancis as sall be thocht be thame expedient’. The ‘statutes of session’ produced in response to this were not particularly innovative. In the main, they merely consolidated in one place a body of rules that had been developed by the lords during the previous half-century at least. Where there does appear to be considerable novelty is in the primary statute (quoted above) relating to the men of law who were to appear in the College. This provided for the creation of the office of general procurator of the council. Ten such general procurators were to be admitted although, in the first instance, only eight were named. Those raised to the new office had to be sufficiently qualified to satisfy the lords that they were worthy of admission. This foreshadowed later practice when the academic and practical qualification of advocates was scrutinised by the judges prior to their admission (although there is little evidence of such scrutiny actually taking place until the books of sederunt begin in 1553). Apart perhaps from the duty placed upon judges confronted by poor litigants who could not obtain representation - to ‘get a lele & wys advocate to folow sic pur

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<sup>1</sup> *A.D.C.P.*, 377: 27 May, 1532.

creaturis causis' - imposed by an act of 1424, there is no evidence of procurators needing a particular qualification prior to 1532.<sup>2</sup> The treatise *Regiam Majestatem* is silent on the question, other than to indicate that clerics below certain ranks could not act as procurators.<sup>3</sup> In practice, provided they were legally competent, it seems that most adult males could act as a procurator and, in some cases, there are also examples of women doing so.<sup>4</sup>

As a requirement for admission as a general procurator, the ability to demonstrate 'knowledge and experience' was extremely vague although no more so than some of the requirements demanded of procurators elsewhere.<sup>5</sup> The real comparison, however, is with foreign advocates and, unlike most continental jurisdictions, in Scotland there was no formal requirement that an advocate admitted to practice before the central civil court hold a university degree. French *avocats* in the *Parlement* of Paris had, from as early as 1345, been required to hold university degrees in civil or canon law.<sup>6</sup> In Malines and Brabant, legislation, dating from 1522 and 1531 respectively, laid down that *avocats* had to be licentiates in both canon and civil law.<sup>7</sup> Similarly, in Castile, legislation dating from 1495 required every new advocate to have undergone

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<sup>2</sup> *A.P.S.*, ii, 8.

<sup>3</sup> Balfour is much more forthcoming (although still in a negative sense) but cannot always be relied on for the period prior to the Reformation.

<sup>4</sup> E.g. Margaret Moncreiff, procurator for her husband: C.S. 5/39 fol. 169v; Margaret Cornwell, procurator for her son: C.S. C.S. 5/38 fols. 49r-v.

<sup>5</sup> For instance, it was laid in 1531 that *procureurs* in the provincial *Conseil souveraine de Brabant* had to be '*aptes, suffisants et convenables*': Rousseaux, 'L'assistance dans la résolution des conflits en Brabant (15<sup>e</sup> - 18<sup>e</sup> siècle), II-17. Henceforth, Rousseaux, 'Brabant'.

<sup>6</sup> B. Auzary and S. Dauchy, 'L'assistance dans la résolution des conflits au civil devant le Parlement de Paris au Moyen Age', 14.

<sup>7</sup> Wijffels, '*Avocats et procureurs*', 6; Rousseaux, 'Brabant', II-17. In the later sixteenth century requirements became even more stringent when political considerations required *avocats* to be graduates of pro-Spanish universities.

a fixed term of study in both the laws at a recognised university.<sup>8</sup> Like most city states in Italy, Florentine lawyers also had to be graduates in law and in fact the majority held doctorates.<sup>9</sup> Even in sixteenth century England, the necessary preliminary to a professional career in law was a period of study in one of the inns of court, although advocates before the ecclesiastical courts were required to have studied civil and (prior to the Reformation) canon law, at university.<sup>10</sup>

Although in its formal requirements the College of Justice in Scotland was out of step, it should not be concluded that the quality of those admitted as its advocates was in any way inferior to those in other jurisdictions. When, during the minority of Queen Mary, the lords began to increase the number of advocates admitted to practise before them they were clearly concerned with the quality of the candidates and a university degree alone was not enough to satisfy them. In 1555 they wanted to receive Master John Moscrop on probation under the condition that ‘gif thir beis ony falt or negligence fundin with him in tyme cuming’ he should be punished and deprived of his office. Moscrop refused to accept office under such a condition and a week later the lords relented and he was admitted unconditionally.<sup>11</sup> But they had made their attitude clear. Those admitted in 1532 had all studied at university, even if in some case only the arts curriculum. Half of them had studied at Orléans, succinctly described by Durkan as ‘the civil law faculty of the university of Paris’, and a

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<sup>8</sup> Kagan, *Lawsuits and Litigants*, 63. The requirements of the university of Salamanca in the fifteenth century are given by Juan Beneyto Perez, ‘The Science of Law in the Spain of the Catholic Kings’, in *Spain in the Fifteenth Century*, (ed.) R. Highfield, 278.

<sup>9</sup> Martines, *Lawyers and Statecraft*, 80.

<sup>10</sup> Ives, *Common Lawyers*, 44; Squibb, *Doctors’ Commons*, 30.

<sup>11</sup> C.S. 6/29 fols. 4v, 6v: 13 and 20 November, 1555.

university which any aspiring continental *avocat* or *letrado* would have been proud to attend.<sup>12</sup>

The eight general procurators named in 1532 were men whose careers, to a significant extent, ran parallel. Three of them, Robert Leslie, Robert Galbraith and Henry Lauder, will be discussed in more detail in later chapters but, as a necessary preliminary, it is essential to consider all of them in context.<sup>13</sup> Assessing these eight men solely as individual lawyers, without reference to each other or to other professional lawyers or, indeed, to the wider society in which they lived, runs the risk of presenting a misleading picture of them. The College of Justice provides a unique common denominator for collective biography but it quickly becomes apparent that it is not the only common factor linking its earliest general procurators.

In terms of education, as many as six of them may have studied abroad, including the four who studied law at Orléans. They had all studied (or, at least, matriculated) at a university, with Johnstone, Leslie and Kincairnie recorded as students at St Andrews.<sup>14</sup> Their appearance there must be seen in the context of several others who studied arts at St Andrews during James V's reign and then went on to have significant legal careers later in the century. The most prominent of these were John Spens, James McGill, John Shairp, Thomas McCalzeane, David Borthwick, Alexander Sym and George Freir.<sup>15</sup> The same is true of those who studied at Orléans -

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<sup>12</sup> J. Durkan, 'The Cultural Background in Sixteenth-Century Scotland', in *Essays on the Scottish Reformation*, (ed.) D. MacRoberts, (Glasgow, 1962), 279.

<sup>13</sup> For Robert Leslie and Robert Galbraith, see chapter five; for Henry Lauder, see chapter seven.

<sup>14</sup> Anderson, *St Andrews Recs.*, (Leslie) 202-3; (Kincairnie) 208; (Johnston) 103, 105, 207.

<sup>15</sup> See Appendix 3.

Lethame, Spittall, Marjoribankis and Johnstone - who also found themselves in good company. David Beaton, the future Cardinal, studied there around the time Johnstone and Marjoribankis had done so, while Lethame was a near contemporary of James Foulis and Arthur Boece, a noted lawyer who became the university canonist at Aberdeen and a lord of session.<sup>16</sup> Slightly senior to Boece at Orléans, Henry Spittall also became university canonist at Aberdeen and, as the appointment demanded, rector of Snow Kirk.<sup>17</sup> Hector Boece describes Spittall as a relative of the bishop of Aberdeen, William Elphinstone.<sup>18</sup> Certainly there is record of him in the vicinity of the commissary court of Aberdeen in 1508 several months prior to his arrival at Orléans.<sup>19</sup> His subsequent career as reader of canon law at Aberdeen was cut short, probably by his decision to marry - an event which must have taken place prior to February, 1517.<sup>20</sup> At that time he was admitted as a burgess of Edinburgh by right of his first wife, Margaret Bothwell and subsequently he was one of the bailies of the burgh.<sup>21</sup> His links with Aberdeen continued however, and in 1518 he was made clerk of the coquet of the burgh.<sup>22</sup> By this time he was also acting as a notary by apostolic authority, designing himself not only '*apostolica auctoritate notarius*' but also

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<sup>16</sup> Beaton was sworn and received as a novice by Johnstone on 16 October, 1519: 'Records of the Scottish Nation at Orléans', (ed.) J. Kirkpatrick, in *Miscellany II*, (Scottish History Society, 1903), 81 [henceforth, Kirkpatrick, 'Scottish Nation at Orléans']; for Boece, see Macfarlane, *Elphinstone*, 321.

<sup>17</sup> Macfarlane, *Elphinstone*, 221, 339.

<sup>18</sup> '*Wilhelmi nostri cognatus*': Boece, *Life of Elphinstone*, (Spalding Club, 1844), 91.

<sup>19</sup> 15 January, 1508: NRA(S) no. 925 (Errol Charters), no. 226. He became a novice in the Scottish nation at Orléans in October, 1508: Kirkpatrick, 'Scottish Nation at Orléans', 81.

<sup>20</sup> Spittall was made Reader in October, 1512: *Fasti Aberdonensis*, 73; cf. Anderson, *Officers and Graduates*, 29, 50.

<sup>21</sup> *Roll of Edinburgh Burgesses and Guild Brothers, 1406-1700*, (ed.) C.B.B. Watson, (*Scottish Record Society*, 1929), 465, (henceforth '*Edin. Burgess Roll*'); as a bailie he appears in 1525: (S.R.O.) R.H. 6/973a.

<sup>22</sup> *R.S.S.*, ii, no. 2973: 6 March, 1518. His links with the Elphinstones also continued. In 1526 he appeared as procurator for Mr Robert Elphinstone, parson of Kincardine, before the lords of the articles: *A.P.S.*, ii, 313. Three years later he held tenements in Edinburgh which had previously been owned by Andrew Elphinstone of Selmes: *Prot. Bk. Foular*, iii, no. 166.



'*Caesarei juris utcunque licentiatus*'.<sup>23</sup> Other contemporary advocates also began their careers as notaries. Perhaps the most prominent example was John Lethame who can be found working as a notary soon after leaving the university of Orléans.<sup>24</sup> But many others, including William Blackstock, a leading advocate of the 1520s, Adam Otterburn and James Henryson can be found drafting instruments as notaries.<sup>25</sup>

Spittall's rise to prominence was to a large extent based on his academic success which in turn probably owed much to his connection with Elphinstone. Thomas Kincaigie was another advocate with a family connection to Aberdeen. The natural son of James Kincaigie, dean of Aberdeen, and later provost of the church of the Virgin Mary de Rupe in St Andrews, he was legitimated in 1531 by which time he was already a successful lawyer.<sup>26</sup> The early life of Thomas Kincaigie is obscure, although he seems to have attended the university of St Andrews.<sup>27</sup> More exotically, it is at least possible that he may be identified with a Scotsman of the same name from the diocese of Dunkeld who obtained a degree in medicine at Louvain in 1522.<sup>28</sup> This would certainly have been a novel approach to the bar, but study at Louvain was not unusual for aspiring Scots lawyers in the sixteenth century. John Abercrombie studied

<sup>23</sup> Fraser, *Montgomeries*, ii, 88: 24 April, 1518.

<sup>24</sup> (S.R.O.) R.H. 6/809: 8 November, 1513, at Melrose Abbey. He was elected proctor of the Scots nation at Orléans on 3 April, 1511: Kirkpatrick, 'Scottish Nation at Orléans', 82. He was certainly back in Scotland by June, 1512, when he is found in the diocese of Glasgow acting as an arbiter: *Prot. Bk. Simon*, no. 580.

<sup>25</sup> For Blackstock as a notary, see an instrument of sasine involving Patrick, Earl Bothwell, (S.R.O.) G.D. 40/3/495(2): 28 May, 1530. For Henryson and Otterburn, see chapter seven.

<sup>26</sup> *R.S.S.*, ii, no. 987: illegitimacy *per se* was no handicap to success as a lawyer and William Elphinstone himself is a good example. James Kincaigie himself was no stranger to appearing before the lords of council: e.g. he was constituted before them on 6 February, 1505: C.S. 5/16 fol. 58v. For him as provost of a church in St Andrews: (S.R.O.) G.D. 20/70 (Crawford Priory Collection): 28 August, 1521.

<sup>27</sup> Anderson, *St Andrews Recs.*, 208.

<sup>28</sup> A. Schillings, *Matricule de L'Université de Louvain*, (Brussels, 1958), III, 673, no. 21.

civil law there in the mid-1530s although it was not until the minority of Queen Mary that the better known lawyer Clement Litill became a student there.<sup>29</sup>

Unfortunately it has not proven possible to use published information to obtain a more complete record of university attendance. There are clues in other sources which suggest that other prominent men of law of the period had studied abroad. Certainly it is clear from his poetry that James Foulis had studied under Robert Galbraith in the university of Paris and it is likely that Galbraith himself studied in Paris before becoming a teacher there.<sup>30</sup> The first king's advocate, James Henryson, had also studied there during the last years of James III's reign. Henry Lauder was sufficiently skilled in spoken French to welcome James V's bride to the burgh of Edinburgh in 1538 which suggests that he had spent some time in France, possibly as a student.<sup>31</sup> Much the same might be said of David Borthwick who was sent to France as a servant of the king's secretary, Thomas Erskine of Brechin, in 1535.<sup>32</sup> The fact that Hugh Rigg was one of those called upon to translate letters of claim written in Dutch, which were produced in litigation by the Arnhem burgess Kerstan Martins in 1542, does not necessarily mean that he had studied in the Low Countries.<sup>33</sup> But it certainly indicates familiarity with the area obtained by trade if not by study.

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<sup>29</sup> Finlayson, *Clement Litill and his Library*, 3.

<sup>30</sup> See chapter five.

<sup>31</sup> *Edin. Burgh Recs.*, ii, 91. Lauder's father, Gilbert, had mercantile links with the continent. In 1525 these led to him being unable to leave Flanders until a debt which he had guaranteed on behalf of a fellow Edinburgh burgess was paid to a Flanders merchant: C.S. 5/35 fols. 216r, 218r: 3-5 March, 1525. It is likely that Gilbert had contacts in France and this might have facilitated Henry's education there.

<sup>32</sup> C.S. 6/7 fol. 13r: 15 November, 1535.

<sup>33</sup> C.S. 7/1/1 fol. 122r: 123 November, 1542. Presumably letters in 'douch and gillers' were written in Oosters, the dominant language in that area: G. Parker, *The Dutch Revolt*, 35-6.

Indeed the civic entry of Mary of Guise to Edinburgh in 1538 so heavily involved lawyers in the burgh that it demonstrates conclusively their contemporary social and cultural importance. Not only did Lauder make the speech of welcome, but he was aided in its composition by Adam Otterburn and James Foulis, men of law who were also noted poets, as well as the playwright and courtier David Lindsay. For the honour of the burgh, twelve men were to be dressed in velvet gowns of various colours. Of the twelve, two were lawyers, Thomas Marjoribankis and Hugh Rigg, one was the father of a lawyer, one the grandfather, and one was the son of a king's advocate.<sup>34</sup> If not necessarily a sign of learning, the privilege conferred was certainly a sign of respectability and it would be unlikely if any of the twelve were unable to speak French. Another lawyer who almost certainly would have participated in the festivities of 1538 was Robert Galbraith. As a philosopher who enjoyed a considerable reputation in France prior to his legal career in Scotland, and also as a poet, it is likely that he played a full part.<sup>35</sup>

Scottish advocates in general were men of good education in the sixteenth century, and those admitted in 1532 were certainly no exception to this. In terms of status there was a high degree of homogeneity within the group. Although they came from different areas of Scotland, Leslie from Fife, Spittall from Perthshire, Kincaigie from Aberdeen, Galbraith from Berwickshire, Johnstone and Lauder from Edinburgh,

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<sup>34</sup> Gilbert Lauder, father of Henry; Alexander Mauchane, grandfather of Alexander; and George Henryson, son of James: *Edinb. B.R.*, ii, 89; Edington, *Court and Culture in Renaissance Scotland: Sir David Lindsay of the Mount*, (1994, East Lothian), 36, 108-9. See also Van Heijnebergen, 'The Interaction between Literature and History in Queen Mary's Edinburgh: The Bannatyne Manuscript and its Prosopographical Context', *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture*, in (edd.) A.A. MacDonald, M. Lynch and I.B. Cowan, (Leiden, 1994), 189.

<sup>35</sup> None of Galbraith's poetry has survived: A.A. MacDonald, 'William Stewart and Court Poetry' in (ed.) Janet Hadley Williams, *Stewart Style 1513-1542: Essays on the Court of James V*, (East Lothian, 1996), 180.

Lethame from within the diocese of Glasgow and Marjoribankis (possibly) from Dumfries, they necessarily had to spend a significant period of time in the capital pursuing their professions before the lords of session.<sup>36</sup> Of the eight, five were burgesses of Edinburgh in 1532 or later became so.<sup>37</sup> Evidence of any trading activity carried on by them is, however, relatively scarce except in the case of Thomas Marjoribankis.

Marjoribankis appears to have been a man whose legal skill was matched by his financial acumen. First noticed as procurator of the Scots nation at Orléans in 1517, he can be found as one of the procurators named, with others including Foulis and Lethame, to appear in St Giles in 1521 before the abbot of Crossraguel as judge delegate.<sup>38</sup> Although he only became an Edinburgh burgess by right of his wife Janet Purves in 1538, he had no difficulty settling into the burgh.<sup>39</sup> In 1523 he received sasine of land resigned by John Purves, his father-in-law, in the High Street near the Nether Bow; land to which he added in 1529 when the council granted him sasine of a neighbouring tenement.<sup>40</sup> By 1536 he was clerk to the king's treasurer and, two years

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<sup>36</sup> The evidence that Marjoribankis was originally from Dumfries is limited to place name evidence, the lands of Marjorybanks being in Dumfries, and also the fact that Thomas can be found associated in a witness list in the tolbooth of Ayr with Ninian Crichton of Bellibocht, sheriff depute of Dumfries: *Prot. Bk. Ros.*, no. 987: 23 April, 1529. William Johnstone's grandfather was from Marjorybanks: Durkan, 'Some Local Heretics', *Transactions of the Dumfries and Galloway Natural History and Antiquarian Society*, xxxvi, (1957-8), 72 [henceforth Durkan, 'Some Local Heretics']. As to Lethame, it has not proven possible to state his origin more precisely.

<sup>37</sup> Henry Lauder, son of a burgess, (1517); Henry Spittall, *iure uxoris*, (1517); Robert Leslie, (1517); Thomas Marjoribankis, *iure uxoris*, (1538), and William Johnstone, son of a burgess, (1538): see *Edinburgh Burgess Roll* 298, 307, 337, 465; and, for Johnston, *ibid.*, 280, Lynch, *Edinburgh and the Reformation*, 83; and Durkan, 'Some Local Heretics', 72-3.

<sup>38</sup> *Prot. Bk. Ros.*, no. 541: 11 March, 1521.

<sup>39</sup> The burgess roll indicates that Marjoribankis was sworn as a burgess in 1538 by right of Janet, the daughter of John Purves: *Edinburgh Burgess Roll*, 337.

<sup>40</sup> *Prot. Bk. Strathauchin*, no. 485: 7 November, 1523; *Prot. Bk. Foular*, iii, 58, (no. 173): 7 December, 1529.

later, he can be found acting as an assessor to the burgh council.<sup>41</sup> Marjoribankis had trading connections in France which he may have initiated during his student days. In 1539 he, along with fellow-burgesses such as Gilbert Lauder, had advanced a considerable sum of money as a loan to Cardinal Beaton.<sup>42</sup> Eight years later, he was able to use his connections in France to provide the relatives of the late Cardinal with bills of exchange redeemable in France. Robert Beaton of Creich, John Beaton of Balfour and Archibald Beaton of Capildra bound themselves to pay Marjoribankis £240 Scots within fifteen days of his presenting a discharge sent by Archibald from France acknowledging receipt there of four hundred French francs.<sup>43</sup> Moreover, Marjoribankis bound himself to pay £650 Scots to his fellow burgess, William Kerr, in the event that the Beatons defaulted in paying that sum to Kerr in return for receiving 1000 francs from him.<sup>44</sup> By contract, they agreed to allow Marjoribankis to distrain their lands in satisfaction of this sum. That Marjoribankis maintained a trade in goods can be demonstrated by reference to a dispute in which he was involved in March, 1546.<sup>45</sup> This concerned the *spuilzie* of a ship, the *Litil Angel*, owned by a Leith merchant. In December, 1545, whilst the ship lay off Scotstoun Crag in Buchan, merchandise belonging to Marjoribankis had been unlawfully removed and he brought an action to recover it. Although the *spuilzie* occurred near to Aberdeen, given the time of year it is conceivable that it had been bound for France and driven north by the weather. Shortly after this dispute arose Marjoribankis' trading activities received a boost when he was granted the privilege of exempting his merchandise from royal

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<sup>41</sup> *T.A.*, vi, 327: 4 June, 1536; *Edinb. B.R.*, ii, 87: 22 May, 1538.

<sup>42</sup> M.H.B. Sanderson, *Cardinal of Scotland*, (Edinburgh, 1986), 58. Henceforth, 'Sanderson, *Cardinal of Scotland*'.

<sup>43</sup> C.S. 6/22 fol. 107v: 22 January, 1547.

<sup>44</sup> C.S. 6/22 fols. 80v-81r: 22 January, 1547.

<sup>45</sup> C.S. 6/23 fol. 42v: 26 March, 1547.

customs.<sup>46</sup> In 1549 Marjoribankis, along with Robert Carnegie of Kinnaird, later treasurer clerk, purchased a three year lease of the mint.<sup>47</sup> The tenure of the lease coincided with a period when prices were high and both Marjoribankis and Carnegie were involved in emergency measures to ensure that food prices were reasonable.<sup>48</sup> Ultimately the lease of the mint must have proved profitable, since Marjoribankis, Carnegie and John Bellenden, the justice clerk, promised to pay £1000 Scots to the Governor, Arran, in 1552 for certain ‘gratitudis and plesouris’ which he had done to them.<sup>49</sup> However few coins appear to have been minted between 1547 and 1553, the date at which the queen’s moneyer brought new dies from the Paris mint and, with an innovative new office of General of the Mint created in 1555, it seems doubtful that Marjoribankis’ lease was a practical success.<sup>50</sup>

In purchasing his major estate, Ratho (which, although in Lothian, was annexed to the sherifffdom of Renfrew), Marjoribankis became involved in a curious dispute with James Stirling of Keir. In 1538 James’ father, Sir John, had sold some of the lands of Ratho to Marjoribankis. In April, 1540, James sold him the rest, allegedly under reversion.<sup>51</sup> According to the deposition of James’ curator, Abraham Crichton, James had asked him to consent to the sale that ‘he mycht redeem certane lands beyond the watter’. Abraham consented although the first charter and precept which James showed him had no corresponding letter of reversion. A new contract was then

<sup>46</sup> *R.S.S.*, iii, no. 1693: 23 May, 1546.

<sup>47</sup> *R.S.S.*, iv, no. 412: 2 September, 1549.

<sup>48</sup> *R.P.C.*, I, 94: 10 April, 1550.

<sup>49</sup> *A.D.C.P.*, 414: 1 February, 1552.

<sup>50</sup> J.D. Bateson, *Coinage in Scotland*, (London, 1997), 100-102.

<sup>51</sup> *R.M.S.*, iii, no. 2208: 2 October, 1540; C.S. 6/21 fols. 130v-130r: 31 July, 1546; C.S. 6/23 fols. 46r-46v: 26 March, 1547.

written, and, since Abraham ‘saw that the contract maid mentioun of ane reversion he thinkit na mair thirto bot subscrivit the samin’.<sup>52</sup> The dispute concerned whether or not a letter of reversion actually existed. The allegation was that Marjoribankis had taken the lands only in security for a debt. In the end either no reversion was found, or the debt was not repaid, since the lands of Ratho continued to be held by Marjoribankis.<sup>53</sup> Although this leaves a suspicion of sharp practice, there is no doubt that Marjoribankis, by his legal, trading and speculating activities, became a wealthy man. In 1557, although like other members of the College of Justice, he was exempt from burgh taxation, William Kerr, bailie of Edinburgh, was allowed twenty pounds in his accounts in respect of Marjoribankis’ exemption from a tax levied to raise forces for the royal host.<sup>54</sup> This was considerably higher than the six pounds allowed in respect of the advocate David McGill or the writer John Young and other writers were assessed as low as ten shillings.<sup>55</sup>

Since they worked, and, for the most part, lived, within the burgh of Edinburgh links easily developed between advocates and particularly between those studied in this chapter. As early as August, 1516, four of the eight general procurators of 1532 - Galbraith, Lauder, Lethame and Spittall - together with James Foulis, can all be found witnessing proceedings in a commissary court held within St Giles.<sup>56</sup> In time two of the eight, Lethame and Johnstone, would themselves become commissaries in the

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<sup>52</sup> C.S. 6/21 fol. 130v.

<sup>53</sup> The eventual outcome of this case has not been traced but Marjoribankis continued to be associated with the lands of Ratho.

<sup>54</sup> Marjoribankis brought an action against the burgh in 1554 for pointing him in respect of £20 worth of tax, pointing out that he had never paid burgh tax since he became a member of the College: *A.D.C.P.*, 635.

<sup>55</sup> *Edin. Accs.*, 36-7: 1557.

<sup>56</sup> *Midlothian Chrs.*, 87ff.



church courts.<sup>57</sup> But record has not always survived that would clarify the family relationships of these men of law. For example, it is likely that the notary Edward Spittall, who became a burgess of Edinburgh during the 1490s, was related in some way to Henry Spittall. Possibly he was an uncle or even an elder brother or half-brother. Edward, who acted for the earl of Montrose and others before the lords of council, was primarily a notary rather than a man of law. However his lack of direct contact with Henry makes any relationship between them tantalisingly difficult to determine. Equally difficult can be the task of tracing parents. In Henry's case, it is likely that his father was James Spittall of Blairlogy in Perthshire. The evidence for this is not contemporary. In December 1516 James resigned his lands to the Governor, Albany, so that they would be regranted to Henry. This transaction is known only because its essentials were narrated in a charter of the lands of Blairlogy by the queen to Alexander Spittall, designed nephew and heir (*nepoti et heredi*) of James, in 1543 some seven years after Henry's death.<sup>58</sup> That Henry had held these lands is known through a charter of confirmation granted to him and his wife in 1530 and also through the designation 'de Blairlogy' applied to him in a precept legitimating his natural son, Master James Spittall, in 1558.<sup>59</sup> There appears to be no direct evidence naming Henry as the son of James although the circumstantial evidence is strong. This contrasts with the evidence concerning men such as Henry Lauder and Robert Galbraith who appeared in court for their fathers making their identity certain.

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<sup>57</sup> Watt, *Fasti*, 330-1. Both were commissary of Lothian, Lethame in 1521 and again in 1529, Johnstone in 1531.

<sup>58</sup> *R.M.S.*, iii, no. 2975: 12 December, 1543.

<sup>59</sup> *R.S.S.*, v, no. 482: 4 September, 1558.



Of the eight general procurators, the fathers of all but two have been identified with a reasonable degree of certainty. The two exceptions are the fairly obscure figure of John Lethame and, more surprisingly, the ubiquitous Thomas Marjoribankis.<sup>60</sup> Of the other six there is a neat symmetry to the position in society occupied by their fathers: two were clerics (Leslie and Kincraigie), two were lairds (Galbraith and Spittall) and two were Edinburgh burgesses (Lauder and Johnstone). This makes all the more remarkable the fact that five of the eight eventually became Edinburgh burgesses, either *iure uxorium* or through service to the burgh. The stigma of illegitimacy affecting the sons of the churchmen did not hold them back because, in Leslie's case, of a family relationship to the earl of Rothes, while Kincraigie's father, as already explained, was close to Bishop Elphinstone. Yet while family background might prove significant in terms of building up trade as a lawyer, there was nothing particularly special about the background of any of these men of law.

A clear indication of how close the day-to-day relations were between the leading advocates within Edinburgh society is given by looking briefly at the activities of James Foulis who, although not named as a general procurator in 1532, was one of the leading advocates of the 1520s.<sup>61</sup> Foulis had made his return to Scotland from his studies in France by early 1513 when he witnessed in Edinburgh a charter by John Crawford, prebendary of St Giles in favour of the convent of Sciennes.<sup>62</sup> Following him on the witness list was William Johnstone (possibly the advocate), and the notaries John Foular and Henry Strachan. At this time, the William Johnstone who

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<sup>60</sup> But see below, footnote 94.

<sup>61</sup> Pace D. Shaw, *General Assemblies*, 143.

<sup>62</sup> *Liber Conventus S. Katherine Senensis*, (Abbotsford Club, 1841), 32: 15 February, 1513.

went on to become an advocate was a student at St Andrews, having matriculated there in 1512. He did not become a licentiate until May, 1516.<sup>63</sup> This does not necessarily preclude his absence from St Giles in 1513 especially since he was from Edinburgh where his father was a leading burghess and one of the macers of the session. Of more immediate interest is the appearance of the notary Henry Strachan, since James' sister Isabel was married to Adam Strachan, probably Henry's brother.<sup>64</sup> Henry's son Vincent also became a notary and so Foulis, nephew of the king's advocate and perhaps a cousin of the notary Thomas Foulis, was also connected by marriage to men of considerable legal knowledge.<sup>65</sup> Henry Strachan was deputy common clerk of Edinburgh and, after his death, the earl of Arran, one of the regents of the kingdom and provost of the burgh, sought to put his own man in this position, going over the head of Adam Otterburn, principal common clerk. Foulis and Carmuir were on hand to witness Otterburn defend himself successfully against this attempt to sideline him.<sup>66</sup>

In April 1514 Foulis was formally entered into a tenement on the north side of the High Street, adjacent to one occupied by his cousin Robert Henryson which used to

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<sup>63</sup> *Recs. of St Andrews University*, 207, 103, 105.

<sup>64</sup> *Prot. Bk. Young*, no. 39: 31 January, 1508. For Isabel as the daughter of Henry Foulis, see *Prot. Bk. Foular*, i, no. vi: 20 March, 1502. Adam Strachan was dead by 16 October, 1503: *Prot. Bk. Foular*, i, no. viii.

<sup>65</sup> His relationship with the king's advocate is discussed in chapter seven. In 1516 James can be found in a witness list to an instrument drawn up by Thomas Foulis, which included also Adam Otterburn and Master Gilbert Strachan, dean of Dunblane: *Prot. Bk. Strathauchin*, no. 232: 25 September, 1516. James was certainly linked to Robert Foulis, burghess of Linlithgow, described as his 'eme' in 1530: C.S. 5/41 fol. 102v: 4 August, 1530. Robert's nephew, Henry Foulis, who is mentioned here might be the same Henry Foulis who was in 1560 a notary public: (S.R.O.) A.D. 1/119: 3 April, 1560. This Henry was dead by December, 1561: C.S. 7/22 fol. 269v. The Foulises of Linlithgow produced a better known notary, another James Foulis, whose mid-sixteenth century protocol book survives: *The Protocol Book of James Foulis, 1546-1553*, (edd.) J. Beveridge and J. Russell, (Scottish Record Society; Edinburgh, 1927).

<sup>66</sup> *Prot. Bk. Strathauchin*, no. 292: 3 February, 1518; Inglis, *Otterburn*, 6-7.

belong to the late Andrew Moubray.<sup>67</sup> That winter, he witnessed a transumpt made in the consistory court of the official of St Andrews, William Wawane, again in St Giles. Others present included John Lethame, James Carmuir and Thomas Hamilton, all fellow advocates.<sup>68</sup> Eight years later, Foulis received further land in Edinburgh, this time in the Cowgate. Sasine was given to him by one of the bailies, Francis Bothwell, under reversion to John Halkerston.<sup>69</sup> Bothwell was married to Katherine Bellenden, sister of his fellow-student at Paris, Thomas Bellenden, who was by now director of the king's chancery and in future was to become the justice-clerk.<sup>70</sup> Bothwell himself was later a provost of Edinburgh and a lord of session.<sup>71</sup> In 1520 his merchant booth, on the north side of the High Street, was occupied by James Marjoribankis who was probably a relative of the advocate Thomas Marjoribankis.<sup>72</sup> Foulis, Bothwell and Adam Otterburn were assessors of the town council at the Michaelmas head court of the burgh in 1528.<sup>73</sup>

Contact between Foulis and a number of men of law can therefore be documented prior to 1532. Of the eight general procurators named in that year, there are two - Robert Leslie and Thomas Kincraigie - with whom his only surviving connection before then is that he was named in letters of procuratory, or in a constitution of procurators, along with them. In relation to Kincraigie, Foulis does appear in a witness list of July, 1531, with Thomas' father, James Kincraigie, dean of Aberdeen and the

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<sup>67</sup> *Prot. Bk. Strathauchin*, no. 184: 28 April, 1514. *Quaere*, was Andrew Adam Otterburn's father-in-law?

<sup>68</sup> (S.R.O.) RH6/827: 13 November, 1514.

<sup>69</sup> *Prot. Bk. Foular*, ii, no. 299: 30 July, 1522.

<sup>70</sup> Bellenden was director of the chancery as early as 1514; C.S. 5/26 fol.174r: 23 October, 1514. His wife supplied velvet to the Queen Dowager in 1536: *T.A.*, vi, 327.

<sup>71</sup> C.S. 5/34 fol. 167r: 16 May, 1524.

<sup>72</sup> *Prot. Bk. Foular*, ii, no. 75: 21 May, 1520.

<sup>73</sup> *Edin. Burgh Recs.*, ii, 3: 6 October, 1528.

justice clerk, Nichol Crawford.<sup>74</sup> But a connection between Kincaigie and Foulis can only be inferred from the fact that both were named general procurators of Robert Aiton in February, 1529.<sup>75</sup> Foulis' name appeared with that of Leslie in an instrument of procuratory dating from 1520 made by James Brown; the other procurators named were Galbraith, Lethame and James Haliburton.<sup>76</sup>

In most cases Foulis can be connected early in his career with the men who emerged as the leading advocates of the reign of James V. Normally, his contact with them occurred in a legal context but this is due to the fact that most of the evidence comes from notarial protocol books containing instruments recording legal processes. What have not been recorded are the social and less formal relations between Foulis and his fellow leading advocates. Nor did Foulis cease contact with his erstwhile fellow advocates in 1532 when he became the first in a significant line of secular men of law appointed to the post of Lord Clerk Register (an office in which he was succeeded by Thomas Marjoribankis in 1549).<sup>77</sup> Although this automatically led to his appointment as a judge in the new College of Justice, and therefore curtailed his activities as an advocate, it did not diminish his interest in law. The only surviving legal books which he definitely owned were volumes of Bartolus' commentary on the *Old* and *New Digest* in a Lyons edition which was not published until 1538.<sup>78</sup> Like Marjoribankis,

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<sup>74</sup> *Aberdeen & Banff Antiquities*, iv, 97: 8 July, 1531.

<sup>75</sup> 26 February, 1529.

<sup>76</sup> Fraser, *Montgomeries*, ii, 91 (no. 106): 15 May, 1520.

<sup>77</sup> A.L. Murray, 'The Lord Clerk Register', *S.H.R.*, (1974), 134; *R.S.S.*, iv, no. 91: 5 February, 1549; *A.D.C.P.*, 580: 8 February, 1549; *DNB*, vii, 510. The *DNB* entry for Foulis indicates that he was knighted in 1539; however this seems doubtful since he was referred to in a variety of documents only as Master James Foulis until his death.

<sup>78</sup> Durkan and Ross, 'Early Libraries', 100. Foulis appears to have owned a manuscript copy of *Regiam Majestatem*, since his name appears frequently inscribed on the Cuyk MS. which bears the date 28 July 1528: *A.P.S.*, i, 203.

Foulis' status as a burghess of Edinburgh probably made it easier for him to import books of this kind and the fact that he and others did so merely underlines the point that Scottish advocates in general were men of good education in the sixteenth century.

There was a good distribution of clients amongst the general procurators before the lords of session during the reign of James V. In terms of the nobility, for example, Henry Lauder can be found acting for the earl Bothwell, and the earls of Crawford, Argyll and Glencairn, while John Lethame represented the earls of Morton and Cassillis as well as the master of Glencairn. Lethame also acted for a number of lesser magnates such as Lord Cathcart and Sir William Sinclair of Roslin. Both Lethame and Lauder acted for Lords Elphinstone and Fleming, while Lauder can also be found representing Lords Ogilvie, Ruthven and Sinclair. Lethame, himself a churchman (he became by 1527 subdean of Trinity collegiate church in Edinburgh, and later parson of Kirkchrist), had several clerical clients including the Abbot of Lindores and the Bishops of Brechin and Galloway.<sup>79</sup> Lauder's clients included the prioress of Eccles and the abbot of Dunfermline. A particularly active advocate was Thomas Hamilton. Even though he was dead by 1525, his major clients during this period included the earls of Moray and Glencairn, Lords Glamis, Herries and Maxwell, and the abbots of Holyrood, Lindores and Paisley.<sup>80</sup> The distribution of major clients amongst the leading men of law is shown in more detail in appendix 2.

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<sup>79</sup> R.M.S., iii, no. 447: 15 April, 1527; G. Brunton and D. Haig, *An Historical Account of the of Senators of the College of Justice from its Institution in MDXXXII*, (Edinburgh, 1832), 62.

<sup>80</sup> *Prot. Bk. Foular*, no. 554: 1 February, 1525.

The crown was not slow to take advantage of the experience and abilities of the leading advocates in the realm. This reflected a tradition of secular men of law who found a niche in royal service which can be traced back at least as far as David Guthrie of Kincaldrum in the 1460s and 1470s.<sup>81</sup> As well as holding the offices of treasurer and comptroller in the royal household, Guthrie also acted as justiciar depute south of the Forth and was sheriff depute of his native Forfar.<sup>82</sup> The tradition was continued in the reigns of James III and IV by figures such as Richard Lawson, Justice Clerk General and a royal councillor, and James Henryson. Of the eight general procurators named in 1532, four (Galbraith, Marjoribankis, Lauder and Lethame) became lords of session. This is impressive considering that Hannay recorded the fact that of the first seventy-four senators of the College of Justice, less than a third had been practising advocates.<sup>83</sup> It has already been noted that Marjoribankis followed in the footsteps of James Foulis in the office of clerk register while, as a later chapter will demonstrate, use was made of the talents of Henry Lauder by appointing him king's advocate in 1538. Ten years after this, Kincraigie was appointed advocate for the poor, a post that had been held (at least jointly) by Marjoribankis. From the ranks of this same group of lawyers came several sheriff deputies, normally constituted as sheriffs *in hac parte* under commissions to carry out specific tasks, normally serving briefs of inquest. For example, Henry Spittall, and two fellow Edinburgh burgesses,

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<sup>81</sup> Guthrie's career has received notable scholarly attention in recent years. He was a graduate laird (having attended university of Cologne), who was active as a forespeaker certainly in the 1460s and in royal government prior to his death in 1474. See, for example, A.R. Borthwick and H.L. MacQueen, 'Three Fifteenth-century Cases', (1986) J.R., 123.

<sup>82</sup> Crawford, *Lives and Characters*, 360-1; *HMC*, 14th Report, part III (MSS of the Duke of Roxburghe), 27; *HMC*, 5th Report, Appendix (Lord Wharncliffe), 622.

<sup>83</sup> G.D. 214/14 (Prof. Hannay's Papers). Hannay mentioned that 24 of the 74 lords created between 1532 and 1608 were advocates, but did not distinguish between ordinary and extra-ordinary lords of session.

were appointed sheriffs of Selkirk *in hac parte* for this purpose in 1527.<sup>84</sup> For the same reason William Johnstone, Henry Lauder and James Lawson had sworn in 1524 that two of them would ‘minister in the schirrefship of Linlithgow’.<sup>85</sup> Thomas Kincraigie in 1528 acted as *commissaris in hac parte* of the archbishop of St Andrews in repledging to the church courts Andrew Kincraigie, who was implicated in the unlawful killing of Alexander Kirkcaldy.<sup>86</sup> In 1552 Kincraigie was sheriff of Dumfries *in hac parte*, and the following year he can be found, again acting with other advocates, as a sheriff of Roxburgh and Peebles *in hac parte*.<sup>87</sup> Others, such as Francis Bothwell, and later advocates like David MacGill and Alexander Mauchane, can also be found in a similar capacity.<sup>88</sup> Men of law might also be found constituted by sheriffs to serve as their deputies; an example being the appointment by John, Lord Erskine, Sheriff of Stirling, of Adam Otterburn and Sir William Scott of Balwearie as joint sheriff-deputes.<sup>89</sup> In 1529 the advocate James Carmuir was appointed one of the clerks ‘*closete domini regis*’, indicating a closer degree of royal service. Marjoribankis, as well as having been treasurer’s clerk, was appointed customar of the burgh of Inverness in 1545.<sup>90</sup> He was also a member of parliament.<sup>91</sup>

Royal service, though not essential, was instrumental in enabling men of law to amass sufficient landed interests to found significant dynasties like the Lawsons of

<sup>84</sup> C.S. 5/37 fol. 15v: 13 March, 1527.

<sup>85</sup> C.S. 5/34 fol. 183r: 21 July, 1524.

<sup>86</sup> (S.R.O.) J.C. 1/3: 21 August, 1528. Andrew Kincraigie has not been further identified.

<sup>87</sup> *R.M.S.*, iv, no. 1621: 28 May, 1552; (S.R.O.) A.D.1/110: 21 April, 1553. Kincraigie took the oath *de fidei administratione* in respect of the latter office on 2 May, 1553.

<sup>88</sup> C.S. 5/34 fol. 162r: 11 May, 1524. Bothwell was sheriff depute of Edinburgh, perhaps indicating a family link with earl Bothwell, the sheriff. For McGill and Mauchane as sheriffs of Haddington *in hac parte*, see (S.R.O.) Biel Muniments, G.D. 6/84: 14 July, 1554.

<sup>89</sup> C.S. 5/34 fol. 163v: 11 May, 1524.

<sup>90</sup> *R.S.S.*, iii, no. 1245: 20 August, 1545.

<sup>91</sup> E.g., *A.P.S.*, ii, 479: 16 August, 1546.



Cairnmuir, the Henrysons of Fordell and the Foulises of Colinton.<sup>92</sup> The descendants of Thomas Marjoribankis could be traced all the way to Lord Tweedmouth in the nineteenth century.<sup>93</sup> The Marjoribankis family tree is complicated by the fact, already noted, that Thomas' parentage is unknown.<sup>94</sup> He himself seems to have had four sons, John, Thomas, Robert and James, and an illegitimate daughter, Janet.<sup>95</sup> John, 'fiar of Ratho', was certainly dead by 1550. Robert was destined for the church and to this end was presented to the vicarage of Craigie in the diocese of Glasgow in 1548.<sup>96</sup> Upon his death a few months later, another son, Thomas, took up the vacant vicarage and as well as prebends in Ross and St Andrews which his brother had also vacated.<sup>97</sup> In 1556 Thomas senior resigned land in Annandale into the hands of Michael, Lord Carlyle, which was regranted to him in life rent and to Thomas, '*ejus nepoti*' (his grandson), in fee.<sup>98</sup> There is no indication of which of the sons was Thomas' father, although John was the eldest.<sup>99</sup> Earlier in 1556, land in Edinburgh was resigned by the burgess James Dalzell and given in sasine to James Marjoribankis, Thomas' son, in return for kindness done to him by Thomas.<sup>100</sup> This James Marjoribankis may be identified with a man of the same name who was acting as a notary in Edinburgh in the 1550s.<sup>101</sup> Although dismissed as clerk register in 1554, and replaced by James

<sup>92</sup> Douglas, *Baronage*, 518ff (Lawsons), 581ff (Henrysons).

<sup>93</sup> *Book of the Old Edinburgh Club*, III, 295.

<sup>94</sup> His father may have been Robert Marjoribankis of that ilk: *R.M.S.*, iv, no. 1112: 2 November, 1556.

<sup>95</sup> His sons are recorded as follows: John and James, *R.S.S.*, iv, no. 988: 10 December, 1550; Thomas, *R.M.S.*, iii, no. 2983: 9 January, 1544; Robert, *R.S.S.*, iii, no. 2756: 2 May, 1548. Janet was legitimated in 1539: *R.S.S.*, ii, no. 2941: 12 March, 1539.

<sup>96</sup> *R.S.S.*, iii, no. 2756: 2 May, 1548.

<sup>97</sup> *R.S.S.*, iii, nos. 3026, 3027, 3028: 16 November, 1548.

<sup>98</sup> *R.M.S.*, iv, no. 1112: 2 November, 1556.

<sup>99</sup> *R.M.S.*, iii, no. 2208: 2 October, 1540. John, who died in 1550, was childless although his wife, Helen Reid, was pregnant when he died. It is unlikely that he was Thomas' father partly because of the dating, but also because, in 1556, Thomas was not described as heir to his grandfather thus suggesting that his father was still alive. Nonetheless, Thomas named his own son John: *Dryburgh Liber*, 327: 8 May, 1581.

<sup>100</sup> *Prot. Bk. King*, no. 106: 21 April, 1556.

<sup>101</sup> E.g., *Prot. Bk. King*, no. 58: 23 November, 1555.



McGill, Thomas Marjoribankis does not appear to have died until about 1561 when he was succeeded by Thomas, his ‘oy (grandson) and air’.<sup>102</sup>

Also interesting is Marjoribankis’ probable connection to the advocate Master John Marjoribankis.<sup>103</sup> Like Thomas, John was a burgess of Edinburgh.<sup>104</sup> He had a brother called William who was dead by July 1549, and they were the sons of the burgess John Marjoribankis.<sup>105</sup> There is no record of when the elder John became a burgess, however there is record of a Simon Marjoribankis being admitted as a burgess by right of his wife in 1516.<sup>106</sup> Close kinship between John and Simon is likely and they may have been brothers. Forty years later, the advocate, Master John, witnessed sasine being given of a tenement neighbouring one belonging to Simon Marjoribankis’ heirs.<sup>107</sup> Evidence linking either Simon or John Marjoribankis senior with Thomas is equally slim although in 1531 Thomas did witness an instrument of sasine drawn up in Simon’s favour.<sup>108</sup> No indication has yet been found of the relationship between Simon, John and Thomas but they may have been brothers. It is certainly known that Thomas had a brother, since in 1545 he received a gift of goods claimed as escheat by the crown following the death of an illegitimate daughter of his (unnamed) brother.<sup>109</sup> It seems likely that through this brother Thomas was related to the mid-century advocate John Marjoribankis and, if more evidence could be found better defining this relationship, it might prove an interesting example of continuity within the same

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<sup>102</sup> *R.S.S.*, v, no. 848: 13 September, 1561.

<sup>103</sup> *Prot. Bk. King*, no. 105: 21 April, 1556.

<sup>104</sup> *Edinb. Burgess Roll*, 337: 10 August, 1561; *Prot. Bk. Thounis*, no. 205: 17 March, 1564.

<sup>105</sup> *Prot. Bk. Johnsoun*, no. 356: 29 July, 1549; (S.R.O.) G.D.1/446/7. John may have had two other brothers, Michael and Clement: *Prot. Bk. King*, no. 9: 27 June, 1555.

<sup>106</sup> *Edinb. Burgess Roll*, 337: 28 March, 1516.

<sup>107</sup> *Prot. Bk. King*, no. 6: 19 June, 1555.

<sup>108</sup> *Prot. Bk. Foular*, iii, no. 322: 3 June, 1531.

<sup>109</sup> *R.S.S.*, iii, no. 1231: 29 June, 1545.

family. Even if no more evidence is forthcoming, it is inconceivable that these Edinburgh branches of the Marjoribankis family were not linked in some way and that John was not influenced by the example of Thomas.<sup>110</sup>

Thomas Marjoribankis did not live much beyond the Reformation crisis of 1560, and religious difficulties did not greatly affect his career. In this respect he was fortunate: the same cannot be said of some of his contemporaries. William Johnstone's career as an advocate was ended abruptly in 1534 by a crisis of faith that was to be replicated in the following years amongst other lawyers. Since they were well read, often educated abroad, and came into contact with large numbers of people both native and foreign, men of law were exposed more than most to new ideas particularly in matters of religion. In 1532 there was no hint that Johnstone might have been unduly influenced by heretical teaching. His education at St Andrews and Orléans was not unusual and he had risen to the rank of commissary of Lothian. In 1534 he was part of an embassy to England and, according to Dr Durkan, his heresy was due to this contact.<sup>111</sup> Adam Abell, in his chronicle *Rota Temporum*, recorded that in 1534 at the feast of the Eucharist in the kirk of Holyrood, the king being present, two heretics were examined and burned for denying that man had free will.<sup>112</sup> Two others, the sheriff of Linlithgow (James Hamilton of Kincavil) and Master William Johnstone fled and were abjured. Johnstone's escheat was granted to the bishop of Aberdeen in

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<sup>110</sup> John can be found connected to James Marjoribankis. For example, James, acting as curator for Alexander Stevenson, appointed both John and Michael Marjoribankis as his procurators in 1555: *Prot. Bk. King*, no. 9: 27 June, 1555.

<sup>111</sup> C.S. 6/4 fol. 18r: 25 February, 1534; Durkan, 'Some Local Heretics', 72.

<sup>112</sup> (N.L.S.) Adv. MS. 1746, fol. 122r. Part of this manuscript, including the portion referred to, has recently been published by A.M. Stewart, 'The Final Folios of Adam Abell's 'Roit or Quheill of Tyme': An Observantine Friar's Reflections on the 1520s and 30s', in (ed.) J. Hadley Williams, *Stewart Style, 1513-1542*, (East Lothian, 1996), 246.

September.<sup>113</sup> The subsequent history of Johnstone is difficult to follow, although he seems to have recanted more than once and certainly survived beyond the Reformation.<sup>114</sup>

Johnstone was the first of several prominent advocates who espoused Protestantism leading up to the Reformation crisis and beyond. It has been suggested that the most notorious heretic of the period, George Wishart, was a younger brother of James Wishart, the king's advocate.<sup>115</sup> The future king's advocate, David Borthwick, part of Arran's circle in the 1540s, was also suspected, and the justice clerk of the time, Thomas Bellenden, may also have had Protestant sympathies.<sup>116</sup> Amongst the eight procurators of 1532, however, Johnstone's case was unique. Even a man like Robert Leslie, who was probably within a fairly close degree of kinship to Norman Leslie, the murderer of Cardinal Beaton in 1546, was conservative in religious matters.<sup>117</sup> But his was the last generation in Scotland relatively untouched by religious controversy, and even amongst his clients were several who were suspected of heresy. The most obvious of these was Johnstone's fellow refugee, James Hamilton of Kincavil. But he was merely one of half a dozen men for whom Leslie acted who at one time or another during their lives came under suspicion of heresy.<sup>118</sup>

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<sup>113</sup> R.S.S., ii, 1583: 16 September, 1534.

<sup>114</sup> Durkan, 'Some Local Heretics', 72-3.

<sup>115</sup> Knox, *History of the Reformation in Scotland*, (ed.) David Laing, (Wodrow Society; Edinburgh, 1855-6), vi, 669. Henceforth, 'Laing, *History*'.

<sup>116</sup> Lynch, *Edinburgh and the Reformation*, 277; Sanderson, *Cardinal of Scotland*, 271.

<sup>117</sup> This is demonstrated in chapter six.

<sup>118</sup> Those with suspected Protestant sympathies include John Erskine of Dun, Patrick, Lord Gray, James Hamilton of Kincavil, James Kirkcaldy of Grange, and Robert, Lord Maxwell: see Sanderson, *Cardinal of Scotland*, Appendix 3.

One of Leslie's clients, John Melville of Raith, was closely connected to the young advocate Henry Balnavis, another native of Fife. Balnavis may have been converted to Protestantism on the continent prior to his studies at St Salvator's College in St Andrews in 1526.<sup>119</sup> His career as a man of law belongs primarily to the 1530s. Balnavis, like James Foulis and Thomas Marjoribankis, had his career in private practice truncated by the acceptance of administrative office which eventually led to a seat in the College of Justice to which he was sworn on 29 July, 1538.<sup>120</sup> He was one of the justices on the Jedburgh ayre in 1541, but prior to this was a clerk to the treasurer, James Kirkcaldy of Grange, a close Protestant ally, and also acted as substitute for the king's advocate.<sup>121</sup> Indeed Balnavis quickly rose to the rank of ambassador when he was one of those sent to discuss the proposed marriage of the infant Mary with Henry VIII's son in 1543.<sup>122</sup> A tenant of Beaton as the archbishop of St. Andrews, he was not directly implicated in his murder in 1546 although he certainly supported it and entered the castle of St Andrews to join the besieged, a political act which interrupted severely his career as a lord of session.<sup>123</sup> As a prisoner at Rouen he wrote the *Treatise on the Justification* for which he is best remembered.<sup>124</sup> Nonetheless it is his legal career which is most significant here because he provides a bridge between the generation of lawyers prominent in 1532 and those who became increasingly important in the 1540s and beyond not only as men of law, but also as office holders and political figures. When Queen Mary

<sup>119</sup> Laing, *History*, iii, 405-6; Hugh Watt, 'Henry Balnavis and the Scottish Reformation', (1935), *Records of the Scottish Church History Society*, 25.

<sup>120</sup> C.S. 6/10 fol. 164v.

<sup>121</sup> *Hamilton Papers*, I, 99-100; (S.R.O.) G.D. 25/1/426 (Ailsa Muniments): 13 July, 1542. See also chapter seven.

<sup>122</sup> *Hamilton Papers*, I, 472, 492: 20 and 27 March, 1543

<sup>123</sup> Lease to Balnavis by Beaton: Fraser, *Melvilles*, iii, 81: 7 March, 1541; Laing, *History*, 408-10.

<sup>124</sup> Laing, *History*, 411.

resigned the crown in favour of her son in 1568, she had plenty of invective for Protestant lawyers such as Balnavis, James Balfour, James McGill, ‘and the rest of that pestiferous factioun’.<sup>125</sup> The study of the role of advocates in the Reformation requires to be done, but there is plenty of evidence that some of them were in the ranks of the most committed Protestants, whilst others, such as Thomas McCalzeane, saw the religious upheaval as an opportunity to make money.<sup>126</sup>

In 1532, when the eight general procurators were named and the College of Justice set up with funding from the church, there can have been little hint of future religious difficulties amongst those chosen. Indeed, the choice of the procurators appears to have been amongst the least innovative aspects of the events of the foundation. As the discussion so far has indicated, they were experienced men who knew each other well. Nor was this the first such generation of lawyers in Scotland. During the reign of James IV the same names tend to appear repeatedly acting as procurators before the lords of session. In using the printed record from 1496 to 1501, Lord Cooper found that James Henryson appeared in private practice on 93 occasions, Thomas Allan on 43 and David Beaton of Caraldstoun on 33.<sup>127</sup> These were certainly some of the leading practitioners, but their activities only tell part of the story. In looking at those who were constituted to act as procurators in roughly the last decade of James IV’s reign, from 25 March 1504 to 24 March 1514, these three men account for almost 13% of all constitutions. If the leading nine procurators from that period are taken,

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<sup>125</sup> Fraser, *Lennox*, ii, 437.

<sup>126</sup> Although Protestant, McCalzeane became custodian of Edinburgh’s most treasured Catholic relics, and, after the Protestant Lords of the Congregation had left Edinburgh in July 1559, he even rented out his house to the returning Catholic Lord Provost, George, Lord Seton: Lynch, *Edinburgh and the Reformation*, 74, 81.

<sup>127</sup> Donaldson, ‘The Legal Profession’, 7; Cooper, *Selected Papers*, 330.

they account as a group for some 41% of all named procurators.<sup>128</sup> Clearly they fell short of enjoying a dominant position. But this figure does illustrate a natural tendency amongst those litigants who named others to represent them to select people who already had some experience of the courts. This tendency increased sharply during the reign of James V. During the decade from 25 March 1524 to 24 March 1534 almost 70% of all nominations made by litigants went to just nine procurators.<sup>129</sup> Four of these account for 42% of nominations.<sup>130</sup>

By the time of the foundation of the College of Justice, there was therefore a strong line of social and professional continuity within the original group of those licensed 'to procure in all actions'. Although recorded constitutions afford the best measure available of procurators' activity, they must be used with care. As was demonstrated in the preceding chapter, not all constitutions were recorded and, of those that were, only a minority of those named jointly and severally in any particular procuratory actually appeared as procurators. At best, therefore, recorded constitutions can only indicate the trend. However, the tables in Appendix 4 do demonstrate clearly that in the years leading to 1532 the trend, using this measure, was for a small group of procurators increasingly to dominate court business. Simultaneously, fewer procurators were being named in each constitution. Thus the nine procurators named most often in the year to 24 March 1517, represented some 60% of all nominations. In

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<sup>128</sup> The leading nine were: Mr John Williamson (7.38%), Mr Walter Lang (6.95%), Mr Matthew Kerr (5.65%), Mr Thomas Allan (4.94%), Mr Adam Otterburn (5.37%), Mr James Henryson (4.13%), Mr David Balfour (3.8%), Mr John Murray (2.71%), Mr Hugh Gifford (1.63%).

<sup>129</sup> The leading nine were: Mr Robert Galbraith (12.5%), Mr Robert Leslie (11.2%), Mr Henry Spittall (9.25%), Mr John Lethame (9.25%), Mr Henry Lauder (9%), Mr Thomas Marjoribankis (7.2%), Mr James Foulis (6.6%), Mr William Blackstock (2.9%) and Mr William Johnstone (1.87%).

<sup>130</sup> Galbraith, Leslie, Spittall and Lethame. See previous footnote.

the year prior to the foundation of the college this had risen to 73% and, in the subsequent year, to 95%. In the year to 24 March 1532, for example, of the one hundred and forty nine nominations, Henry Lauder alone had twenty four of them (16%). The following year John Lethame on his own had almost 23%. That means that almost one in four litigants whose constitution of procurators was recorded, named him as one of their procurators. Increasingly, only two or three procurators were being nominated in each constitution, and it is likely that this led to a significant growth in the proportion of the court's business which went to the leading advocates. As the statistics demonstrate, those individuals admitted in 1532 were increasingly at the forefront of activity.

The reliability of this trend can be tested by looking at court appearances. In chapter five the careers of Robert Leslie and Robert Galbraith will be investigated in more detail. At the moment, it is relevant to consider only the tables given in Appendix 7 demonstrating which advocates opposed them most often in cases brought before the lords of session. On its own, the reliability of this measure is again questionable. In many cases in the record the presence of men of law is not indicated. The clerks were understandably selective in the facts which they recorded. Wherever a party was personally present then this was stated because it was the legally relevant fact. Sometimes, a man of law will be recorded as that party's forespeaker if he does something which the clerks were required to record. Otherwise his presence was insignificant and was ignored. It is therefore impossible to tell in many cases whether a party who appeared personally did so alone or together with a legal adviser. What can be done, however, is to take note of the definite appearances made by men of law



and this has been done whenever they appeared in opposition to either Robert Leslie or Robert Galbraith. This must be understood as representing the absolute minimum number of appearances although there is no reason to suspect that the outcome would be significantly different if the clerks had routinely recorded all appearances by legal representatives. The tables which have been produced corroborate the evidence used earlier and add weight to the conclusion that a few advocates were increasingly dominant in practice as well as being increasingly popular amongst litigants.

### **Procurators of the court**

From 1527 onwards the phrase '*cum ceteris procuratoribus curie*' or its vernacular equivalents such as 'with the rest of the advocates of the court', or 'with the rest of the court' or 'with the remaining advocates', is increasingly found in recorded constitutions before the lords of council immediately following the names of those nominated. Out of the 1138 recorded constitutions between 1504 and 1535, the phrase appears in 107 of them.<sup>131</sup> There are two isolated examples of its use from 1507 and 1524, but generally it was most used in the years immediately preceding and following 1532. A similar phrase can be found in the act book of the official of Lothian in the 1540s.<sup>132</sup> Nothing definite is known about who these 'procurators of the court' were, or what their status was in each court, although the fact that they were 'of the court' clearly implies that some kind of judicial control was being exercised over them.

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<sup>131</sup> See Appendix 1.

<sup>132</sup> Ollivant, *Court of the Official*, 58, fn. 178.

In seeking to identify the 'procurators of the court' the most likely candidates are obviously those already mentioned as being the most active advocates. Most of the constitutions containing the *cum ceteris curie* clause named at least one of the general procurators of 1532. The only exceptions to this were constitutions which named only one procurator and this occurred in three cases where Master William Blackstock, Master Hugh Rigg and Master John Gledstanes respectively were named on their own together with the phrase '*cum ceteris curie*'. Perhaps the best guide to identifying the procurators of the court is to isolate all the constitutions in which only one man was named together with 'the rest of the procurators of the court'. In addition to the three mentioned, this occurred only in the cases of the following advocates: Robert Galbraith, Henry Lauder, John Lethame, Robert Leslie, Henry Spittall and Thomas Marjoribankis. Rigg and Gledstanes only came onto the scene after the foundation of the College in 1532 while Blackstock died shortly before it. There can be little doubt that the other six, together with Blackstock, were 'of the court' prior to 1532. It is difficult to say whether any others enjoyed this status. William Johnstone and Thomas Kincraigie, the remainder of those licensed in 1532, are the most obvious candidates. A possible hypothesis is that the group of 'procurators of the court' numbered ten. This would explain why provision was made at the setting up of the College of Justice for ten general procurators when only eight were admitted. The lords were not creating a new system from scratch; they were simply regulating an existing framework which hitherto is not directly revealed by the record. They were prevented from naming ten procurators straight away in May, 1532, because of the untimely death of Blackstock towards the end of 1531 and also the promotion of James Foulis to their own ranks as lord clerk register in March. Besides, it seems likely that the

number admitted was quickly increased to nine with the addition of Hugh Rigg. The other possible candidate as a procurator of the court in 1532 was James Carmuir. Although his level of activity was relatively low, he seems to have been active as a procurator from about 1513 until the early 1540s. His appointment as '*clericus closete regis*' in 1529, mentioned earlier, may have excluded him from being admitted as a general procurator.

In the comparative context a central civil court with only a small number of licensed advocates was not unusual. The concept of a *numerus clausus* can be found in secular courts in other jurisdictions. In England quotas can be found as early as the late thirteenth century.<sup>133</sup> Limits on the number of *avocats* were imposed in the *Grand Conseil de Malines* and the *Conseil provincial de Namur*.<sup>134</sup> By legislation introduced in 1500, only six *avocats* and eight *procureurs* were permitted to appear before the *Counseil souveraine de Brabant*, although the number of lawyers increased to one hundred in the second half of the sixteenth century.<sup>135</sup> In Dijon there was a clear growth of legal professionals at the expense of notaries during the sixteenth century and as a phenomenon this may have been replicated elsewhere.<sup>136</sup> Castile also saw a dramatic rise in numbers during the sixteenth century with eight advocates registered in the chancillería of Valladolid in 1497 and fifty-six registered there in 1589.<sup>137</sup> This mirrors the increase in Scotland although the reasons why such an increase should

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<sup>133</sup> Brand, *English Legal Profession*, 149.

<sup>134</sup> Wijffels, '*Avocats et procureurs*', 6; Vael, '*Conseil provincial de Namur*', 3-16.

<sup>135</sup> Rousseaux, '*Brabant*', II-17.

<sup>136</sup> J.R. Farr, 'Dijon's Social Structure 1450-1750', in *Cities and Social Change in Early Modern France*, (ed.) P. Benedict, (London, 1992), 141.

<sup>137</sup> Kagan, *Lawyers and Litigation*, 63. The Spanish kingdoms, of course, did have a much greater number of lawyers in absolute terms than Scotland.

have occurred across western Europe at this time must involve economic, social, political and even religious factors which require broader study.

It has been suggested that numbers of advocates in the major English church courts remained small because the advocates who enjoyed a monopoly sought to maintain their practice, and so their high fees, by excluding others.<sup>138</sup> This meant that no new advocate might be appointed until the death or removal of an existing advocate. The latter rule was not explicitly stated in Scotland until 1590 by which time the upper limit on the number of advocates was to be fifty.<sup>139</sup> For the first two decades of the College of Justice, however, the number of licensed advocates did not rise above the original limit of ten and it does seem to have been the case in practice that a new advocate was admitted only after another had died or been created a senator of the College. The fact that there is no record of advocates' admission oaths until the 1550s makes this impossible to prove. However, a list of those admitted to practice as general procurators was recorded in 1549 and contains only nine names.<sup>140</sup> A seventeenth century source, commenting on the *acta* as he read them, provided a list of the major advocates in 1537 which amounted to eight names, none of which can be argued with although the list is not contemporary nor does it purport to indicate that those eight were admitted on any particular day.<sup>141</sup> Indeed the '1537 list' is demonstrably incomplete because it does not include Thomas Kincaid who was

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<sup>138</sup> Helmholz, 'Ethical Standards', 47.

<sup>139</sup> Edinburgh University Library (E.U.L.), La. III. 399, fol. 116: 18 July, 1590.

<sup>140</sup> See Appendix 3.

<sup>141</sup> (E.U.L.) La. III. 399, Lord Fountainhall's Collection, 'Notices and Observations out of the buikis of sederunt of the Lordis of Session: Statutes of Session', fol. 2. It seems that Francis Grant, *Advocates*, has accepted the date of the entry in this list of excerpts from the *acta* as the date of admission of the lawyers which it names. This was clearly not what the compiler meant to convey. There is no evidence that any of these lawyers was admitted on the day in question.

certainly still active before the lords and who, in the 1549 list, was the only original general procurator still practising.<sup>142</sup> His case-load was never large and the compiler of the manuscript in the seventeenth century, whose purpose was to record the ‘cheiff advocattis in Sessioun’, may therefore have excluded him.<sup>143</sup>

Kincraigie’s survival underlines the fact that the advocates who were thrust into the limelight by the foundation of the College of Justice in 1532 represent in some ways the end of a generation. Although Marjoribankis, Lethame, Lauder and Johnstone were all also still alive in 1549, with the exception of the disgraced Johnstone they were all lords of session. As practising lawyers they had largely been replaced by a new generation which had begun to make its appearance within the first few years of the new court’s existence. Men such as Hugh Rigg, George Strang, William Wightman, James McGill and Thomas McCalzeane had taken over.<sup>144</sup> Although the earliest appearance of Thomas McCalzeane as a procurator before the lords of council was on 1 February, 1535, he can be found in another source in connection with a legal dispute as early as 1527.<sup>145</sup> These were the men who went on to have significant careers as advocates and, in the cases of McGill and McCalzeane, as lords of session.

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<sup>142</sup> *A.D.C.P.*, 584. See Appendix 3.

<sup>143</sup> (E.U.L.) La. III. 399, fol. 2.

<sup>144</sup> Rigg appeared as a procurator from 1532; Strang was regularly appearing as a procurator by 1540 (e.g. C.S. 6/13 fol. 47v: 30 June, 1540); Wightman was appearing by late 1538 (e.g. C.S. 6/11 fol. 53r: 19 December, 1538); McGill was also a regular by 1540 (e.g. C.S. 6/13 fol. 83v: 15 July, 1540).

<sup>145</sup> C.S. 6/6 fol. 30r; (S.R.O.) NP1/168 (*Prot. Bk. John Feyrn*, no pagination): 18 October, 1527. This underlines the inaccuracy of Grant’s assertion that McCalzeane was one of a group admitted as an advocate on 16 November, 1537.

## Chapter Four

### 1532: Compelling Counsel and the Procurators of the Court

‘...and that thir forsaidis procuratouris procure for every man for thair waigis bot giff thai have ressonable excus.’<sup>1</sup>

The lords in 1532 gave no reason as to why so few advocates were admitted by them into the College of Justice. There may have been a lack of suitable candidates, with most educated men preferring careers in the church or in royal service; or the lords, desiring to maintain a tight control over the quality of advocates, may have selected only the most experienced. Pressure may have come from the advocates themselves, as happened in other jurisdictions, to limit numbers and so to protect their client base and their income. But there is no real evidence to support any of these theories.<sup>2</sup> What the lords patently did not do was to create a monopoly. They created the office of ‘general procurator’. Those who held it clearly had a special status, one consequence of which was the dominant position which between them they enjoyed in terms of their share of court business. But other procurators continued to appear before the lords although probably in a smaller proportion of cases. In the year from November 1535 there were at least 37 different procurators who appeared before the court and who did not enjoy the special status of general procurator.<sup>3</sup> The precise content of that

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<sup>1</sup> *A.D.C.P.*, 377: 27 May, 1532.

<sup>2</sup> Ollivant was impressed by the large number of procurators who appeared before the official of Lothian in the 1540s. This runs somewhat against the trend described in the College of Justice but, even on his own figures, it seems that a small proportion of the procurators dominated the business of the court: Ollivant, *Court of the Official*, 175.

<sup>3</sup> Excluding from this list judges, scribes, and macers of the court who sometimes acted as procurators (and who come broadly under the umbrella of ‘members of the court’), and those appearing in 1536 who only later became general procurators (men who were regular professional advocates but who were younger, less experienced and so inferior in status), still leaves 28 special procurators who had no obvious connection with the court.

status is unknown. Cases involving general procurators were not privileged as they were cases involving the lords and so initially they were subject to the same delays and accorded the same precedence as any other ordinary action. In 1537 Thomas Marjoribankis, on behalf of himself and his colleagues, secured a concession permitting summonses concerning general procurators to be placed in the privileged table.<sup>4</sup> This, the earliest example in the record of advocates as a group working together to achieve a common goal, does not necessarily indicate that they had a corporate identity. But it does underline the fact that real power lay with the lords rather than the advocates even with their special status.

The obvious inference is that in 1532 eight advocates were given the sole right to act generally on behalf of clients, representing them in all matters which might concern them arising before the court. To ensure the smooth running of business, these advocates may have enjoyed other privileges which were understood but not written down at the time. Since the law was to a great extent their livelihood, so that their rights of audience were vital to them, it was reasonable to presume that they would not willingly jeopardise those rights of audience by sharp practice. On that basis there may have been a certain leniency permitted to general procurators, in terms of proving that they had a mandate and so on, which the lords would not have allowed to other procurators with whom they were less familiar. This is necessarily speculative. Of the eight constitutions of general procurators recorded after May 1532, they are predictably dominated by those formally admitted to practice before the College.

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<sup>4</sup> *A.D.C.P.*, 465.



Whatever advantages the eight general procurators had, it is clear from the case law of the court that the right to act as a general procurator carried with it the obligation to do so in certain circumstances. The significance of the ‘procurators of the court’ in the late 1520s is directly related to the rule laid down by the lords in 1532 that a procurator must act unless he had a reasonable excuse for not doing so. By implication, what was ‘reasonable’ was a question for the lords to determine. But the issue of judicial control over advocates was not one which arose suddenly in 1532 and to understand the intricacies of this rule it is necessary to investigate how the lords dealt with the issue of refusals by advocates to represent clients.

### **The rules concerning representation**

During the 1520s there had been several cases in which advocates had refused to act on behalf of litigants. Sometimes the reasons behind such refusals are obscure. Money does not appear to have been the motive. Advocates declined to act even where potential clients offered considerable sums to secure their services. Even though James Pantoun offered ‘large expensis’ to ‘divers’ advocates to defend him against an action of spuilzie he was still unsuccessful.<sup>5</sup> For some reason no one was prepared to appear for him in court, although it is possible that an advocate helped him draft his defences. In 1530, John Tweedie of Drummelzier protested that no advocate would represent him ‘nowthir for command nor reward howbeit he wald have gevin quhat thai wald have askit’.<sup>6</sup> Such claims should be viewed in context; they were made by litigants who sought to delay actions against them on the basis that they could not

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<sup>5</sup> C.S. 5/37 fol. 40v: 21 March, 1527.

<sup>6</sup> C.S. 5/41 fol. 7v: 14 March, 1530. See below.

obtain the services of an advocate. In order to get such a delay, they had to persuade the court that their claim was not frivolous and that they had been diligent in trying to hire an advocate. The clearest way to demonstrate diligence was to indicate that money had been offered and declined and there is no reason to doubt that it had been.

Refusals to act, and a general difficulty encountered by litigants in securing advocates' services, led the courts to develop procedural rules governing representation. So far as is known these rules were not written down in any contemporary treatise; they were part of the 'practick' of the courts in the 1520s and their existence can only be inferred from the case-law of the period. The first rule is evident from the defences put forward against a summons of treason in 1528 on behalf of the earl of Angus by his secretary, John Ballantyne.<sup>7</sup> These defences stated that, since Angus and his fellow accused could not secure the services of a man of law, they should not be compelled to answer the summons unless an advocate was provided to them. It was specifically asserted that it was the legal duty of a judge to provide an advocate to any person called before him at that person's expense. There is irony in the fact that Ballantyne appeared before the lords to speak on behalf of Angus in order to argue that Angus could not find anyone to speak on his behalf. This might merely indicate prevarication. But the fact that this argument seems to have been accepted may indicate the degree of specialisation that had by now attached to the profession of advocate; Ballantyne could state the grounds of defence but he was not sufficiently skilled to argue the merits of the case. The idea that it was a judge's duty to provide an advocate appears to have been generally applicable at this time. As early

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<sup>7</sup> *A.P.S.*, ii, 322-4.

as 1516 the chancellor, in a letter which he subscribed on 16 May, implied that he was prepared to order a man of law to procure on behalf of dean Alexander Cunningham.<sup>8</sup>

In 1523 Robert Barton and other men of Leith, in a dispute with Edinburgh concerning profits from prize ships, protested that they desired an advocate and could not get one and so should not be compelled to answer until they had one.<sup>9</sup> Eventually Robert Leslie agreed to act on their behalf having been instructed to do so by the lords.<sup>10</sup>

Six years later in 1529 it was argued before the bailies of the regality court of Dunfermline that they could not proceed in an action because of the defenders' claim that they should not be required to make an answer to the summons without an expert man of law.<sup>11</sup> This argument was initially rejected but on appeal to the lords of council the bailies' decision was effectively reversed. The lords found that the judges in the regality court had shown themselves to be partial by failing to appoint an advocate to the defenders as the law had required them to do. The case concerned the validity of an assignation of a lease made to the defenders by a deceased relative of theirs. In so important a matter, alleged the defenders, they should have an advocate to put forward their case and they were prepared to prove before the bailies that 'thai had maid exact deligence in all the partiis of this realm quhare expert men in the law was'.<sup>12</sup>

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<sup>8</sup> C.S. 5/27 fol. 230v: 16 May, 1516. Cunningham, a monk at Glenluce, was accused of barratry.

<sup>9</sup> C.S. 5/33 fol. 117r. On this litigation see J.C. Irons, *Leith and Its Antiquities*, (Edinburgh, 1897), chapter XIII, 149ff, and appendices 29-31; W. Stanford Reid, 'Robert Barton of Ovir Barnton' *Medievalia et Humanistica*, v, (1948), 55-6; *Skipper from Leith: A History of Robert Barton of Over Barnton*, (Philadelphia, 1965), 54-5, 164ff.

<sup>10</sup> C.S. 5/33 fol. 119r:

<sup>11</sup> C.S. 5/39 fols. 141r-142v.

<sup>12</sup> No reason is given for their lack of success: C.S. fol. 141v. Several men of law were natives of Fife. Even non-native men of law can be found practising before courts in Fife and it is clear that distance

The final case illustrating the rule involved Andrew Baron and the other heirs of the late Sir William Brown. Balfour cited this case as authority for the rule, as he expressed it, that:

‘Gif ony partie beand persewit dois diligence befor ane Judge to get a Procuratour for himself, and cannot obtene the samin, he sould not be compellit to answer to the summondis, quhill (until) the Judge provide him an Advocat upon his expensis.’<sup>13</sup>

Brown had been summoned for treason although Baron argued that he had done nothing which could competently give rise to such a charge.<sup>14</sup> In propounding this argument Baron was careful not to make himself an accomplice to Brown’s alleged crimes by appearing to defend them: responding to the allegation that he had shown himself to be art and part in Brown’s crimes by making his plea, Baron made it clear that it was not his intention to defend Brown but rather to defend his own right to Brown’s goods which would be lost if they were forfeited to the crown.<sup>15</sup> Baron and his co-defenders, all with interests in these goods, were unable to employ procurators to represent them having tried diligently to do so. Indeed they had gone so far as to instruct a macer to charge Robert Galbraith, Robert Leslie, Henry Spittall and James Carmuir to procure for them but they had all refused.<sup>16</sup> On the basis of this refusal, they successfully brought a defence stating that they should not be compelled to

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was no object for them. For example, Henry Spittall appeared in the court of John lord Lindsay of the Byres, Sheriff principal of Fife, on 28 March 1528: C.S. 5/39 fol. 67v.

<sup>13</sup> *B.P.*, ii, 299.

<sup>14</sup> C.S. 5/41 fols. 158v-160r: 19 January, 1531.

<sup>15</sup> This allegation was made by Thomas Scott on behalf of the king. Adam Otterburn, the king’s advocate, was present and on the sederunt. For the division of responsibility between treasury officials such as Scott, and the king’s advocate, see chapter six.

<sup>16</sup> This appears to be the only case in which a defender names specific men of law who were not willing to represent him.

answer the summons against them until the lords provided them with advocates upon their expenses. It seems that Balfour was unaware that the rule he was describing predated the case he cited.

The second rule created by the lords prior to the foundation of the College of Justice was that no advocate could see a party's summons, or the evidence which he intended to use in a case, unless he agreed to accept the case and to act for that party.<sup>17</sup> This rule was explicitly enacted by the lords in 1528 probably in response to an action which was heard in 1527. There is no need to go into the political background of the case in detail but it is clear that the principal defender, Isabel Stewart, Countess of Lennox, was politically isolated. Her husband had been killed the previous year in a failed attempt to liberate the king, who was still a minor, from the custody of the earl of Angus. Angus had been in illegal possession of the king since 1525 and it was on the basis of this control over the person of the king that he controlled the government. It was an accepted fact of late medieval Scottish government that during periods of minority, control of the king was vital to effective government. The action which Angus brought against Isabel Stewart, and two local lairds, in 1527 was brought in conjunction with the earl of Arran and others who formed the governing faction. Angus' government was very narrowly based and depended mainly on his control of patronage and government offices, many of which were given to his relatives and allies. In order to obtain control of Lennox lands Angus had made numerous grants of ward on lands in that area all going to a fairly small number of people. Wardship of the lands of the earl of Lennox was granted to Angus himself and his ally the earl of

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<sup>17</sup> C.S. 5/38 fol. 127r : 8 July, 1528.

Arran, jointly. These grants were not particularly successful (basically they were trying to take the revenue of the earldom while the new earl was in his minority) in that local tenants, unsurprisingly, refused to pay up.<sup>18</sup> The particular dispute in 1527 appears to have given rise to an action and a counter action. First Angus and his associates sought payment of rents and, secondly, Isabel counterclaimed arguing that she had been jointly infeft in the lands with her husband and so had the right to continue in possession of them and that the rents belonged to her. Although the legal issue was straightforward, it must have been obvious that Isabel had no realistic chance of success. Her co-defenders, two local landowners who were affected by the action, protested that they should not be prejudiced by it because ‘thai couth nocht have a procuratour to procure for thame’. Sir James Hamilton then asked that it be noted that the lords had appointed Master Henry Spittall to be procuratour for the defenders. In response the defenders wanted it to be noted that Spittall had admitted to having already given counsel against them in the matter and that therefore he could not act in the case. It was another unwritten rule of legal practice that an advocate could not appear for both sides at once and it was clearly accepted in this case that Spittall, having advised one side, could not advise the other. It is clear from the record of the case that Isabel, as she put it, ‘can get na advocate to gif hir counsale nor zit that dare spek for hir’.<sup>19</sup> This is not surprising when any advocate representing her would have been faced with the motley crew of Angus, Arran and James Hamilton of Finnart - the man rumoured to have murdered her husband Lennox after he had surrendered.

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<sup>18</sup> Emond, *Minority of James V*, 529-31.

<sup>19</sup> C.S. 5/37 fols. 74v, 131r: 2 April and 29 May, 1527.

In the circumstances, Spittall cannot have been disappointed that he could not act for the defence enjoying, as he did, an excuse which in 1527 the lords undoubtedly accepted as 'reasonable'. As a result of the rule made in 1528 his excuse would not have been admitted (since he should not have looked at the summons without agreeing to take the case); and it is likely that the lords after 1532 would have considered such an excuse to be unreasonable. Indeed the rules under discussion were not specifically mentioned in the acts of sederunt of 1532 and it seems likely that they were subsumed in the general principle laid down in that year that advocates must accept a case unless they had a reasonable excuse for not doing so.

These rules could not have been enforced without sanctions and the sanctions applied were twofold: an advocate who refused to act could either be fined or have his rights of audience before the court suspended. The latter penalty was meaningful only to those 'procurators of the court' who appeared regularly before the lords. There is only one example of this ultimate sanction being applied and it occurred in the context of one of the most acrimonious disputes to come before the lords in the years preceding the foundation of the College of Justice. It was based on the feud between the Tweedies of Drummelzier, supporters of Angus and aligned with the pro-English faction in Scotland, and the Flemings, strong supporters of the Albany governorship and pro-French in outlook. The dispute between the families centred on Katherine Fraser, heiress of Fruid in Peeblesshire.<sup>20</sup> The ward and marriage of Fruid was disputed by both sides. The feud was sparked in 1524 by the murder in Edinburgh of John,

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<sup>20</sup> M.F. Tweedie, *The History of the Tweedie or Tweedy Family*, (1902), 26-30; J.W. Buchan and H. Paton, *History of Peeblesshire*, (Glasgow, 1927), iii, 403-4, 425ff.



Lord Fleming, an act for which John Tweedie was put to the horn.<sup>21</sup> Fleming's son Malcolm was imprisoned until he agreed to a marriage between Katherine and one of John Tweedie's sons. He later alleged that his 'consent' had only been given under duress whilst in captivity. In spite of an apparent accommodation, leading to the payment of assythment and the issuing of a respite to the Tweedies, the dispute concerning Katherine continued into the 1530s with Malcom, Lord Fleming, demanding either her delivery in an unmarried state (rather impractical in the circumstances) or the avail of her marriage to which he still laid claim.

By March 1530 Tweedie was clearly finding it difficult to obtain the services of an advocate. He pointed out that although the lords 'had commandit all the advocatis or ane part of thame to procure for him in the actioun movit be him aganis the lord [F]lemyng' none would do so no matter how much money he offered.<sup>22</sup> This obviously suggests that the advocates of the court were regarded as a group. His difficulties were unresolved by December, at which time the lords appointed Henry Spittall and Thomas Marjoribankis to represent him. When they refused, the lords responded by withdrawing their permission for both of them to procure before them.<sup>23</sup> This draconian ban seems to have had the desired result. The following month both advocates, together with John Lethame who may have taken on the role of mediator, appear in the record acting for Tweedie. But in doing so, they took the precaution of extracting a promise from Tweedie that he would not look upon their efforts with

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<sup>21</sup> Fleming, the Great Chamberlain, appears to have been murdered shortly after sitting in judgment in the Tolbooth: *Edin. Burgh Recs.*, ii, 224-6; C.S. 5/42 fol. 5r.

<sup>22</sup> C.S. 5/41 fol. 7v: 14 March, 1530.

<sup>23</sup> C.S. 5/41 fol. 140v. Spittall was representing Tweedie in 1525: C.S. 5/35 fol. 44r but this was two months before he was put to the horn.

displeasure.<sup>24</sup> They were afraid of their client but they may also have been influenced by fear of his opponent Lord Fleming.<sup>25</sup>

Two other instances of judicial compulsion in the 1520s illustrate not only the need for intervention by the lords to provide unpopular litigants with advocates, but also their willingness to do so. These cases dealt with topics common enough before the lords; only the element of compulsion makes them unusual. The first, in December, 1522, involved an action raised in the king's name against Andrew Ballone.<sup>26</sup> Ballone was a canon of St Andrews and it was alleged that he had committed barratry - that is the offence of trafficking in ecclesiastical appointments.<sup>27</sup> Allegedly he had purchased the priory of Inchmahome at Rome without the king's permission. Inchmahome had been annexed to the chapel royal at Stirling by Pope Julius II in 1508 and so this transgression was perhaps particularly blatant.<sup>28</sup> Robert Leslie was compelled to procure for the alleged prior and protested that 'na actione nor cryme suld be impute to him' for so doing. Barratry was a civil matter although the major penalty was banishment. Quite often it is described as being treasonable and inasmuch as it was an attack on the privileges of the crown it was a serious matter.

The second case, that of the bishop of Brechin against Euphemia Ramsay, was also of a kind fairly typical in the sixteenth century.<sup>29</sup> It involved the wrongful occupation of

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<sup>24</sup> C.S. 5/42 fol. 2v.

<sup>25</sup> Fleming appears to have been as unsavoury a character as Tweedie. Others were certainly afraid of him: when, in August 1527, Walter Scott of Braxholm complained that he could not have sure passage to appear in court in Edinburgh, Fleming stated that he was ready to give him assurance that he might appear 'unhurt unharmit or trublit' by him: C.S. 5/37 fol. 191r.

<sup>26</sup> C.S. 5/33 fol. 78r: 9 December, 1522.

<sup>27</sup> On barratry, see also chapter seven.

<sup>28</sup> Cowan and Easson, *Medieval Religious Houses*, 92.

<sup>29</sup> C.S. 5/33 fols. 93r-v; 94r: 15 December, 1522.

lands. Euphemia alleged that she had received a lease of the lands of Balrorny in Forfar from the prior of St Andrews who she alleged had been given power by the bishop to grant the lease. The bishop denied this and he also denied that he had promised on oath that he would never remove Euphemia from the lands. John Lethame, acting for the bishop, claimed that he had been discharged by the vicar general in Brechin and so wanted to leave the case. The lords compelled him to continue with the case notwithstanding this. This is a difficult case to interpret. Clearly there was compulsion but Lethame was not being forced to act for someone he was unwilling to act for. The issue may have involved the competence of the discharge made by the vicar general as the representative of the bishop. This was a revocation but it had not been made by the bishop and the lords might have taken the view that it was technically invalid and so Lethame should continue; but the case seems out of step with the others mentioned above in that the lords were interfering in an established advocate-client relationship rather than seeking to form such a relationship.

It is evident that when the lords came to frame the general concept concerning representation in 1532 they already had in mind procedural rules which they then conflated into the principle that an advocate could not without good reason refuse a client who offered to pay his fee. As has been described, these rules had been based upon a small group of procurators of the court who increasingly dominated business and who alone were subject to compulsion. The principle enunciated in 1532 was not entirely satisfactory however. It did not remove the concerns of advocates that they might suffer from being too closely identified with the interest, and sins, of their

clients. Nor did it address the needs of a significant part of the population who could simply not afford to offer payment to secure the services of an advocate.

In the remaining years of James V's reign, advocates can still be found refusing to act for clients or protesting about the fact that the court was compelling them to act. In November 1537 Master Hugh Rigg had to be compelled by the lords to procure on behalf of John Leslie, an alleged barrator. Rigg ensured that his protest was entered in the record so that in the future no crime could be impute to him, explaining that he acted by 'compulsion & obedience that he aucht (owed) to the command of the saidis lordis & na uther wyse.'<sup>30</sup> Two years later Rigg, this time with unnamed colleagues, was ordered to represent James Colville of East Wemyss, the former comptroller, who had been charged by the king with treason.<sup>31</sup> Rigg agreed to act but again wanted it made clear that he did so under protest and that his agreement in these circumstances should not make him criminally liable in future.<sup>32</sup> The tendency of men of law to look after their own interests by distancing themselves from those who were accused of criminal or quasi-criminal activity cannot have inspired much confidence in their clients.

In 1540 Alexander Forrester of Corstorphine brought an action against David Forrester of Garden.<sup>33</sup> Alexander had given David the barony of Corstorphine under a

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<sup>30</sup> C.S. 6/9 fol. 29v.

<sup>31</sup> Colville was charged on the basis that he had communicated with Angus. Rigg's reluctance to represent him was understandable given that at this period, following the execution of Janet Douglas, lady Glamis, in 1537, James V was on the lookout for signs of conspiracy against him and suspicious of anyone with links to Angus. As was mentioned in chapter three, Robert Leslie, albeit posthumously, was also accused of treason in the wake of James' anxieties.

<sup>32</sup> *A.P.S.*, ii, 353. Compare the case involving Andrew Baron quoted above.

<sup>33</sup> C.S. 6/14 fols. 15r-v: 27 November 1540; C.S. 6/14 fol. 46v: 17 December 1540.

reversion. David, having been warned to come to the altar of St James in the church of St Giles on a specific day to receive payment of the sum under the reversion, failed to do so. Alexander, having appeared and offered the money then consigned it to the safe-keeping of Thomas Marjoribankis. The lords decerned that the barony had been lawfully redeemed and ordered David to resign and quitclaim the land in terms of the reversion. This was all rather straightforward apart from the fact that for some reason David could not persuade an advocate to represent him. Even though the lords ordered certain advocates to procure for him, 'nane of thaim wald except [accept] the samin bot refusit aluterlie to procure for him'.<sup>34</sup> Unfortunately no reason was given for their refusal.

It is clear that the lords' attempt in 1532 to deal with the problem of litigants who could not obtain the services of an advocate did not succeed. Two acts of sederunt in the mid-1550s indicate that the problem still existed. In 1554 the lords declared that both pursuers and defenders were 'daily and continualie' coming before them and making the excuse that they could not get a procurator, with the result that the lords were greatly hindered and justice much delayed. Such excuses, as a result, were no longer to be heard or admitted.<sup>35</sup> This merely indicates that the defence was no longer acceptable; it does not mean that the defence was genuine. The following year, it was decided that no party could choose more than two advocates (including his pensioners), without then giving his adversary the opportunity to choose any other two he pleased, provided he did not seek a delay 'throw pretence of wanting of

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<sup>34</sup> C.S. 6/14 fol. 15v.

<sup>35</sup> C.S. 1/1 fol. 1r.

thame'.<sup>36</sup> They also took the opportunity to reiterate the rule of 1532, slightly recasting it in even stronger terms by stating that:

‘no advocattis, without verrie gret cause, [may] refuse to procure for ony partie upounne thair ressonable expensis under the pane of deprivation of thame of thair offices of advocatiounne.’

Clearly, power still lay with the judges rather than the advocates. It is questionable whether this in itself worked to the disadvantage of the advocates as a group. The small number of advocates who were admitted to the College in its first twenty years were not self selecting, nor did they exercise a monopoly, but they did dominate the market place for legal services. There is no indication that they were dissatisfied with their lot. When numbers of advocates began to increase, from the 1550s onwards, this may have changed. The earliest known evidence of the existence of some kind of official body representing the advocates does not come until 1582 when John Shairp was described as ‘dene of the advocatiis of the session’. Arguably it was when they grew in number that the collective power of advocates, vis-à-vis the judges, increased. But this very growth in numbers, overseen as it was by the judges, may have been the catalyst to closer co-operation amongst existing advocates: the admission of too many young ‘expectants’ would have threatened the position and income of those already in practice.

This leaves one other aspect of 1532, and the rule concerning representation, to be discussed: the poor. It can be no accident that the lords did not impose on advocates an obligation to represent any person, irrespective of ability to pay, who might require

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<sup>36</sup> Islay Campbell, *Acts of Sederunt*, 60.

their services. Given the number of poor litigants, this would have created an intolerable burden. Nonetheless, this discrimination did give the poor a genuine ground for complaint. The king was required to give justice to all his people, not merely those who could afford advocates to represent them, and it was only the latter group whom the lords were willing to help by the use of compulsion. It may have been pressure from the poor that led, in March 1535, to a very public resurrection of the office of advocate for the poor which occurred in tandem with a drive to regulate and limit begging.<sup>37</sup>

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<sup>37</sup> J.M. Goodare, *Parliament and Society*, 416. As Dr. Goodare has shown, municipal initiatives for the relief of poverty were not introduced in Scotland until the 1550s, although they did build on the network of poor hospitals already in existence. It is interesting that pre-1535 legislation concerning the poor drew its inspiration from legislation dating from 1425, the time when the concept of advocate for the poor is first mentioned (*infra*): Goodare, *ibid.*, 417.



## The advocate for the poor

Knowledge was seen as a gift from God. There was therefore a considerable debate in the late medieval period as to whether or not it might be sold.<sup>38</sup> The debate centred on university teachers, who often held regular salaries or had income from benefices, and many were of the view that they should transmit knowledge to their students without a fee. To some, heavily influenced by Roman law, this view equally applied to professors of law and other jurists.<sup>39</sup> According to Ulpian, the teacher of law should neither demand money nor seek gifts, although he could honourably accept them.<sup>40</sup> When this view encountered Christian teaching concerning the alleviation of the suffering of the poor the result, from the Council of Chalcedon in 451 onwards, was a positive duty on clerics to give legal counsel to widows, orphans and the poor.<sup>41</sup> Bishops in particular came under a duty to protect what the canonists called '*miserabiles personae*', a term not always easily defined but generally including those disadvantaged because of their status, such as widows and orphans, always provided they were also poor in fact.<sup>42</sup> A decretal of Honorius III authorized judges to appoint advocates for poor people. Little is known about how court-appointees in such circumstances were remunerated although the number of poor litigants indicates some relief was given, either from public funds or by the advocates themselves in the form

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<sup>38</sup> Gaines Post et al., "The Medieval Heritage of a Humanistic Ideal: '*Scientia Donum Dei Est, Unde Vendi Non Potest*'", 11, (1955), *Traditio*, 197ff. Henceforth, Post, '*Scientia*'.

<sup>39</sup> Post, '*Scientia*', 204.

<sup>40</sup> D.50.13.1.4-5.

<sup>41</sup> J.A. Brundage, 'Legal Aid for the Poor and the Professionalization of Law in the Middle Ages', (1988), *Journal of Legal History*, 170. Henceforth, Brundage, 'Legal Aid'.

<sup>42</sup> On the various definitions of this term, see R.H. Helmholz, *The Spirit of Classical Canon Law*, (Georgia, 1996), 128-132. Henceforth, Helmholz, *Classical Canon Law*.

of remission of fees. The provision of legal advice to the poor has been viewed as ‘an integral characteristic of professional status’.<sup>43</sup>

In Scotland, legislation dating from the reign of James I instructed judges to provide an advocate for those ‘pur creaturis’ who were unable to secure the services of one.<sup>44</sup> This was done, evidently for the love of God, at a time of significant innovation in the administration of justice. No provision was made to pay any advocate who might be instructed to act for a poor litigant, except that if the litigant were successful the losing party was to pay for the advocate’s ‘costis and travale’. This was a potentially attractive incentive but it is not known how successful this legislation was. Scotland was not unique in providing poor litigants with advocates in the civil sphere, nor was it the first kingdom in Europe to maintain an advocate for the poor from crown revenues. From the late thirteenth century kings of Castile paid for an *abogado de pobres* to represent the poor, while from 1473 provision was made for an *avocat* and a *procureur* to act for poor people, *pro Deo*, at the *Grand Conseil de Malines*.<sup>45</sup> Nor indeed is there much in the way of evidence that the rule was being observed in practice in Scotland during the fifteenth century. Not until 1502 is there a reference to a case in which there appeared an ‘advocat til the pure folkis’; and the man who fulfilled this role was the king’s advocate, James Henryson.<sup>46</sup>

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<sup>43</sup> Brundage, ‘Legal Aid’, 175.

<sup>44</sup> *A.P.S.*, ii, 8.

<sup>45</sup> Kagan, *Lawsuits and Litigants*, 13; Wijfells, ‘*Avocats et procureurs*’, fn. 96, (*Ordonnance of Thionville*, 1473, art. 22). An *Ordonnance* of 1364 made similar provision before the *Parlement de Paris*, imposing upon judges the duty to provide a *procureur* to impoverished litigants: B. Auzary and S. Dauchy, ‘*Parlement de Paris*’, 16.

<sup>46</sup> *A.D.C.*, iii, 323.

As was common elsewhere in Europe, a large number of cases involving the poor, normally described as ‘poor tenants’, can be found in the record. Normally they used procurators and most of the leading procurators of the day appeared for such clients on occasion. For example, Master William Blackstock appeared in January, 1530, for the poor tenant, John Bruce, who acted against Patrick, Master of Hailes, as sheriff depute of Edinburgh and Helen Shaw who had been served to the lands of which John was a tenant.<sup>47</sup> Since inordinate process was alleged, John’s summons also ran in the king’s name but it is noticeable that he was represented separately and not by the king’s advocate. Nothing is known about the basis upon which these procurators were employed nor whether they remitted all or part of their fee. Nor is it easy to know how poor the poor actually were. Since most of them were described as ‘poor tenants’ it is clear that the courts were dealing with the settled poor, those who had little and yet something to lose, rather than vagrants and beggars.<sup>48</sup> It is clear that for his summons to be placed in the ‘pure folkis table’, and therefore to benefit from the services of the advocate for the poor, a litigant had to show that his income fell below a certain monetary threshold. At the end of James V’s reign, William Mowbray was disqualified from asserting the privilege of the poor’s table because he had sufficient land in liferent as to afford him seven shillings worth of food annually.<sup>49</sup> In 1536, by contrast, Janet Newton of Dalcois was allowed to benefit from the privilege even though her opponent alleged that she was a landowner and also that she was to receive five hundred pounds from him.<sup>50</sup> According to canon law, poverty was to be defined

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<sup>47</sup> C.S. 5/40 fol. 156r: 12 January, 1530.

<sup>48</sup> The settled poor were the great majority, and tended to be viewed as more deserving than vagrants: Goodare, *Parliament and Society*, 414. In principle, however, there seems to be no reason why the advocate for the poor might not represent a vagrant, provided he had just cause to litigate.

<sup>49</sup> C.S. 6/19 fol. 38r: 8 May, 1542.

<sup>50</sup> C.S. 6/7 fol. 164r: 23 March, 1536.

according to current means, not future expectations, and this might be an example of that principle being applied in the College of Justice.<sup>51</sup>

As mentioned above, it was in March 1535 that steps were taken to put the office of advocate for the poor on a firmer footing. Narrating that numerous poor lieges daily complained that there were no advocates to procure for them, and that they lacked the money to afford to pay for one, the king directed the lords to choose a man of good conscience as *advocatus pauperum*.<sup>52</sup> He was to swear to represent all those who came to him for help and who themselves were prepared to take an oath that they lacked the means to pursue justice themselves. In return he was to receive ten pounds *per annum*. This was a small amount in return for a potentially extremely burdensome task but it seems clear that the role of advocate for the poor was not envisaged as being a full-time one. In the event of the advocate being found false, the lords were instructed to remove him from office and also to prevent him appearing as an advocate in any other cases until he was reconciled to the king. This is reminiscent of the sanction at the *Conseil Provincial de Namur* where apparently any *avocat* who refused to work for a poor person might find himself suspended from appearing before the court.<sup>53</sup> The motive behind the 1535 appointment was partly to respond to demand and partly, once again, for the honour of God. To supplement this new office, provision was soon made to speed up procedure for ‘pur miserable persounis’ because they lacked the substance to remain in Edinburgh to await the ordinary course of litigation.<sup>54</sup> Cases concerning the poor were thenceforward to be heard on a Friday,

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<sup>51</sup> Helmholz, *Classical Canon Law*, 131.

<sup>52</sup> *A.D.C.P.*, 434-5: 2 March, 1535.

<sup>53</sup> Vael, Namur, 3-13.

<sup>54</sup> *C.S.* 6/6 fol. 111v: 27 April, 1535.

which was normally one of the days set aside for the king's matters. It is significant that in his brief discussion of the role of the advocate for the poor, Balfour only mentioned the steps taken in 1535; he ignored, or was ignorant of, the legislation of James I.<sup>55</sup>

In response to the king's instruction, the lords nominated not one but two advocates to act jointly and severally for the poor: Thomas Marjoribankis and John Gledstanes. With Marjoribankis' consent, Gledstanes alone was to receive the annual salary. It has been plausibly suggested that this meant Gledstanes was working under the supervision of Marjoribankis.<sup>56</sup> Gledstanes probably began as a chancery scribe, having received three pounds from the fees of the privy seal in 1532.<sup>57</sup> Shortly thereafter he went to France in order to study although by this time he was already a licentiate in both the laws. Before leaving Gledstanes and his cousin, Patrick Fraser, petitioned the lords of council to certify that they were of noble status.<sup>58</sup> In 1537 Gledstanes' appointment as commissary of Glasgow made it impossible to continue as advocate for the poor in Edinburgh.<sup>59</sup>

There is no record of any payment being made from the treasury to an advocate for the poor until 1537 when Master John Williamson received the fee of ten pounds.<sup>60</sup> He is further recorded as receiving this pension in the two subsequent years.<sup>61</sup> Like

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<sup>55</sup> *B.P.*, ii, 299.

<sup>56</sup> Hannay, *College of Justice*, 69.

<sup>57</sup> *R.S.S.*, ii, 770.

<sup>58</sup> *R.M.S.*, iii, no. 1263.

<sup>59</sup> Watt, *Fasti*, 191.

<sup>60</sup> *T.A.*, vi, 357.

<sup>61</sup> *T.A.*, vi, 447; vii, 200.

Gledstanes, Williamson was a churchman. Governor of the hospital of the Virgin Mary in Edinburgh in 1525, and provost of Seton, by 1534 he was also commissary of Lothian although this did not affect his ability to appear for the poor before the lords of council.<sup>62</sup> In the years leading to his appointment as advocate for the poor he was also responsible for collecting ecclesiastical taxes from various deaneries within the diocese of St Andrews. By 1540 Williamson was sharing the role of advocate for the poor with Andrew Blackstock, the pension having been raised to twenty pounds annually shared equally between them and payable twice in the year in equal instalments.<sup>63</sup> Thereafter only Blackstock is recorded as *advocatus pauperum* in the treasurer's accounts, with payments of twenty pounds to him recorded in 1542 and forty pounds in 1546 (made in arrears in respect of the previous three years).<sup>64</sup> This would indicate that the pension had reverted to ten pounds when he alone held office. There is no indication of why Blackstock replaced Williamson. Blackstock himself was replaced by Thomas Kincraigie, probably in 1546. This time the pension was increased, although Kincraigie was not paid until 1550 receiving eighty pounds at the rate of twenty pounds per year probably in respect of the previous four years.<sup>65</sup> Further payments indicate that Kincraigie was connected to the office of advocate to the poor until 1563, although he was not always alone.<sup>66</sup> From 1558 Master Edward Henryson was also being paid ten pounds yearly for representing the poor.<sup>67</sup> His fee was paid at the special command of the queen whereas Kincraigie was paid out of ordinary revenue from the treasury. Henryson was a renowned scholar and former

<sup>62</sup> (S.R.O.) RH 6/973a: 11 October, 1525; *R.M.S.*, iii, no. 2172; Watt, *Fasti*, 331, 373.

<sup>63</sup> *R.S.S.*, ii, no. 3261: 7 January, 1540.

<sup>64</sup> *T.A.*, viii, 106, 487.

<sup>65</sup> *T.A.*, ix, 447.

<sup>66</sup> *T.A.*, x, 132, 214, 294, 296, 444; xi, 36, 256.

<sup>67</sup> *T.A.*, x, 354, 402; xi, 220.

lecturer at Bourges. He was employed as a translator of Greek in the household of Henry Sinclair, dean of Glasgow and lord of session and he had numerous other links with educated Scots churchmen.<sup>68</sup> His post as advocate for the poor may have been provided to augment his income; Marie of Guise had already employed him to read one lecture in the laws and one in Greek thrice weekly in Edinburgh. After February 1563 there is no further record of payments made to Kincraigie or Henryson. In May, 1564, Master John Logie was appointed advocate to the poor.<sup>69</sup> Although he was to receive the same fee as his predecessors, to be paid out of 'the reddiest of hir graces casualiteis', no record of any payments made to advocates for the poor appears in the treasurer's accounts until the 1570s when the fee of sixty pounds annually was disbursed to unidentified procurators for the poor.<sup>70</sup> Unless the customary pension had by then been raised once again, this would indicate an innovation in that there were by now three office-holders.

In sum, the evidence indicates that the office of advocate for the poor was held consistently from 1535 onwards until a short gap in the mid-1560s. The office holders were without exception skilled lawyers although in the main they were men whose backgrounds tended towards practice in the church courts. The institution during the latter part of James V's reign indicates a serious attempt to address a perceived imbalance in the provision of legal services although it would require analysis of a great number of cases over a considerable period of time in order to discover the extent to which it was successful in its aim.

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<sup>68</sup> Durkan, 'The Beginnings of Humanism', 16; 'The Royal Lectureships under Mary of Lorraine', (1983), *SHR*, 74.

<sup>69</sup> *R.S.S.*, v, no. 1701: 24 May, 1564.

<sup>70</sup> *T.A.*, xiii, 104 (1575), 233 (1578 - 3 years in arrears), 312 (1579).



## Chapter Five

### The Life of the Law: Practice and Procedure

In 1532, having been explicitly granted the power to make such rules, statutes and ordinances as were required to regulate procedure before the College of Justice, the lords of session set out in broad terms the content of that procedure.<sup>1</sup> Judging from what can be gleaned from the *acta* in the 1520s there was little novelty in the procedural rules that the lords enunciated: they largely confirmed the ‘stile and consuetude’ of the court as it had been developing in previous decades. This ‘stile’, the body of rules particular to a specific court, is the factor which distinguishes the procedural rules of the major courts of western Europe at this period. Procedure developed through legal practice and, to the legal practitioner, the obvious reservoir of procedural knowledge was the authoritative texts relating to the most influential and successful system then devised: the Romano-canonical. There are signs that it would be unwise to draw too sharp a distinction in the early sixteenth century between the procedures adopted in the spiritual jurisdiction and those which were used before the lords of session.<sup>2</sup> Experienced canonists, such as William Elphinstone, William Wawane and Abraham Crichton, were key personnel not only in the consistory but also in the session. Many of the thirty or so men of law practising before the court of the official of Lothian in the middle of the sixteenth

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<sup>1</sup> For the various interpretations of this event see H.L. MacQueen ‘Jurisdiction in Heritage and the Lords of Council and Session after 1532’ in W.D.H. Sellar (ed.), *Miscellany II*, (Stair Society, 1984), 61.

<sup>2</sup> On the similarities between canonist practice and modern civil court practice see T.M. Cooper, *Select Scottish Cases of the Thirteenth Century*, Introduction, xxxv-xxxvii.

century also appeared before the lords of session.<sup>3</sup> Such a free interchange of personnel would certainly have affected the development of procedural rules.<sup>4</sup>

Numerous texts of canon and civilian writers circulated in Scotland in the fifteenth and sixteenth centuries and amongst these were works on procedure including the extremely influential *Speculum Judiciale* of Guillaume Durand.<sup>5</sup> Of course, such texts were often purchased by those studying abroad, some of whom then returned and practised law in the Scottish courts. But it should not be overlooked that, once in Scotland, these texts were widely borrowed and consulted. For example, in his testament written in 1555 Master David Whitelaw mentioned several civilian and canonist works some of which were in the hands of others including the man of law Master Thomas McCalzeane.<sup>6</sup> An inscription on a breviary owned by Clement Litill indicates that the book, originally owned by Master John Moscrop, was taken by Master John Monypenny from whom it was taken by Litill.<sup>7</sup> This was apparently done covertly although the amount of overt borrowing between men of law of other - in particular legal and procedural - texts would have been significant not only in the 1550s but earlier. Such works were not only loaned but were passed on from generation to generation. Thus Abraham Crichton, official of Lothian and an extremely active man of law in the secular courts, almost certainly passed on

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<sup>3</sup> Ollivant, *Court of the Official*, 60-1.

<sup>4</sup> J.J. Robertson has drawn attention to the similarity of the interlocutors of the Roman Rota with the acts of the lords of council in civil causes. The significance of this relates to the fact that in the majority of cases the pleadings before the Rota were made in Rome by Scottish procurators: Robertson, 'The Development of the Law' in (ed.) J. Brown, *Scottish Society in the Fifteenth Century*, (London, 1977), 151-2.

<sup>5</sup> J. Durkan and A. Ross, 'Early Scottish Libraries', (1958), *I.R.*, 5-167. Henceforth, Durkan and Ross, 'Early Scottish Libraries'.

<sup>6</sup> *Prot. Bk. Grote* no. 107. McCalzeane was a graduate of St Andrews; there is no evidence that he himself studied abroad although he clearly had access to a reasonably good library.

<sup>7</sup> Finlayson, *Clement Litill*, 6. Litill, Moscrop and Monypenny were all advocates.

canonist texts to his legitimated son George, who was admitted as an advocate in November 1557.<sup>8</sup> Such behaviour would have been widespread and was extremely important in disseminating legal knowledge.<sup>9</sup>

The libraries built up in the second half of the sixteenth century by men such as Clement Litill and Thomas Hamilton, James VI's Advocate, had counterparts earlier in the century in the libraries of printed books owned by such men as Willaim Elphinstone, Robert Reid and Henry Sinclair.<sup>10</sup> In addition to these works in print numerous manuscripts were in circulation. The most important of these were manuscripts of *Regiam Majestatem* which were still being produced in the late sixteenth century.<sup>11</sup> There is clear evidence of the use of *Regiam* before the lords of council although few citations of it were recorded during the 1520s.<sup>12</sup> Men of law certainly owned manuscript copies of it often compiled with other material such as collections of old statutes and assises and *Quoniam Attachiamenta*: in short, a bundle of materials, designed for practical use, and perhaps put together to form a handy 'starter-pack' for those wishing to learn the 'practick'.<sup>13</sup>

<sup>8</sup> Master George Crichton was legitimated in March 1554: *R.S.S.*, iv, no. 2584. He was admitted advocate on 12 November 1557: *C.S.* 6/29 fol. 55r.

<sup>9</sup> The importance of the possession of books on professional advancement was demonstrated by the eminent Spanish lawyer, Doctor Alonso Diaz de Montalvo, who divided his books into works on canon law and civil law and then left them to his two grandsons instructing them to cast lots to determine which subject each should study and so which kind of lawyer each would become: Juan Beneyto Perez, 'The Science of Law in the Spain of the Catholic Kings', in R. Highfield, (ed.) *Spain in the Fifteenth Century*, 279.

<sup>10</sup> On Littill's library see Finlayson, *Clement Litill*; on Hamilton, see B. Hillyard "'Durkan and Ross' and Beyond", in (edd.) A.A. MacDonald, M. Lynch and I.B. Cowan, *The Renaissance in Scotland*, (Leiden, 1994), 367; as for Elphinstone, Reid and Sinclair see Durkan and Ross, 'Early Scottish Libraries', 5-167.

<sup>11</sup> On the extant manuscripts, see Buchanan 'The MSS. of *Regiam Majestatem*: An Experiment' (1937) *J.R.* 217. The treatise was not printed until Skene's editions of 1609.

<sup>12</sup> It is cited by James Henryson in 1503: *A.D.C.*, iii, 193; on the evidence for its use in practice, see MacQueen *Common Law* 89-98.

<sup>13</sup> It is clear that scribes involved in copying the manuscripts of *Quoniam* were producing texts for the practitioner's library: T.D. Fergus, *Quoniam Attachiamenta*, (Stair Society; Edinburgh, 1996), 95.

Nonetheless it is the case that direct evidence of authority being taken from the learned law does not often reach the record.<sup>14</sup> The reason is simply scribal practice: the focus was on noting procedural points and only rarely was the substance of arguments given or the authorities used cited. These rare examples, such as the citation of Nicolas de Tudeschis, John de Ferrarriis and Johannes Andreae by the earl of Buchan's forespeaker George Stirling in 1503, or John Moscrop regaling the provost and bailies of Edinburgh in 1562 with stories of Cicero, confirm that there is no reason to doubt that many of the texts in circulation were actually used in argument before the courts.<sup>15</sup> An impressive array of sources is quoted in Sinclair's *Practicks*.<sup>16</sup> But from the *acta* it is impossible to measure the influence which such writings had on the development of 'practick' before the lords of session.<sup>17</sup> What is clear is that this 'practick' was unique to the session. A similar range of authorities might have stood at the basis of procedure in contemporary courts abroad such as the *Reichskammergericht*, the *Parlement de Paris* and the *Grand Conseil de Malines*.<sup>18</sup> But what distinguishes these courts are the particular rules developed by the courts themselves. There was a clear differentiation between the 'stile' or 'practick' of the lords of session and the 'theorik of the legistes and canonistes'.<sup>19</sup> While the content of this 'practick' certainly owed much to Romano-canonical sources and to those

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Robert Galbraith compiled one of the surviving manuscripts containing this kind of material (see chapter six) and, as was mentioned in chapter three, James Foulis almost certainly owned another: *A.P.S.*, 192-3, 203.

<sup>14</sup> Murray, 'Sinclair's *Practicks*', 102.

<sup>15</sup> *A.D.C.*, iii, 309-310 (cited by Murray, 'Sinclair's *Practicks*', 102); *Edin. Burgh Recs.*, iii, 149.

<sup>16</sup> See the sources cited by Murray, 'Sinclair's *Practicks*', 103. Dr. Murray correctly points out that the impression gained from Balfour, of solid concentration on native sources, is misleading as an indication of the absence of more sophisticated legal knowledge.

<sup>17</sup> An example of the more typical reference to the learned law found in the *acta* occurred in 1517 when Thomas Hamilton, in relation to a summons of error, 'offerit to produce lawis baith civile & canoun makand the said summond is inept in the self becaus thir wes no mencion of the day zeit nor place of the serving of the brief & retour': C.S. 5/29 fol. 83v: 19 March, 1517.

familiar with church procedure, it increasingly came to represent an independent body of rules in much the same way as has been argued in relation to the courts of the Low Countries that distinctive features emerged making the manner of litigation more or less unique.<sup>20</sup>

The technicality of the 'practick' of the session during James V's reign was not yet sufficient to discourage litigants from appearing personally, without a man of law, at least in relatively routine matters. In assessing this legal process from the viewpoint of the advocates most intimately involved with it, it is necessary to include discussion of the physical environment in which it operated and the practical difficulties faced by them in preparing cases for litigation.

### **(i) Architecture**

Originally courts were often held in the open air in the vicinity of local strongholds. Churchyards were also a popular meeting place.<sup>21</sup> With the castle being the original *caput* of the sheriffdom, open air courts continued to be held, even into the sixteenth century, on 'motte-hills', the original sites of castles that had fallen into decay and been rebuilt nearby, as well as within the castles themselves.<sup>22</sup> As late as 1539, for instance, there is reference to the sheriff court of Perth being held 'at the Court hill of

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<sup>18</sup> R.C. Van Caenegem, 'The Developed Procedure of the Second Middle Ages XI-XV Century' *Encyclopaedia of Comparative Law*, xvi, III; C.H. van Rhee, *Great Council of Malines*.

<sup>19</sup> Sinclair's Practicks c. 132: cited by Murray, 'Sinclair's Practicks', 102.

<sup>20</sup> Van Rhee, *Grand Council of Malines*, 12-14.

<sup>21</sup> Elizabeth Ewan, *Townlife in Fourteenth Century Scotland*, (Edinburgh 1990), 11; *Fife Court Bk.*, xix. It is even possible to find an example of procurators being constituted in the cemetery of Abernethy parish church in 1556: *Prot. Bk. Gaw*, no. 159.

<sup>22</sup> *Fife Court Bk.*, introduction, xii-xiii.

Skone'.<sup>23</sup> But by the end of the fifteenth century outdoor courts were rare and the castle had begun to give way to the burgh Tolbooth or *praetorium* as the place where secular courts were customarily held.<sup>24</sup> For example, the head courts of the burgh of Glasgow met in the Tolbooth by the fifteenth century<sup>25</sup>; in 1529 the sheriff of Ayr is recorded as sitting in the Tolbooth of that burgh while a justice court was held in the Tolbooth of Peebles and, in 1530, the regality court of Dunfermline sat 'in *pretorio* de kirkcaldy'.<sup>26</sup> In 1540 Master David Borthwick, a future king's advocate, is recorded as presenting letters from the king to the bailies, council and community of Haddington convened 'within the pretor' of the burgh.<sup>27</sup> A similar assembly of bailies, councillors and masters of the crafts was meeting within the Tolbooth of Edinburgh in February 1518 when Adam Otterburn, common clerk of the burgh, rose from his seat to protest at an attempt to usurp his right of appointing a deputy clerk; a stand for burghal independence that ended with triumphant shouts of 'Otterburn, Otterburn'.<sup>28</sup>

Given that Tolbooths also functioned as prisons justiciary courts also came to be held within them. Thus, in Lauder in 1506 a charter was transumed in the court of

<sup>23</sup> Fraser, *Keir*, 364.

<sup>24</sup> *Fife Court Bk.*, introduction, xix and Appendix I. Consistory courts were held in cathedral churches within each diocese; Glasgow consistory court, built on three storeys, projected from the southwest of Glasgow Cathedral: L.J. Macfarlane, *William Elphinstone and The Kingdom of Scotland 1531-1514* (Aberdeen, 1985), 61. The court of the Official of Lothian sat in St Giles: Ollivant, *The Official*, 45. Men of law more associated with secular courts might still be present there on occasion e.g. Foulis and Marjoribankis were at a consistory court in St Giles in April 1521: (S.R.O.) R.H. 6/909.

<sup>25</sup> Norman F. Shead, 'Glasgow: An Ecclesiastical Burgh', *The Scottish Medieval Town*, (edd.) M. Lynch, M. Spearman, G. Stell, (Edinburgh, 1988), 126. Henceforth, *The Scottish Medieval Town*.

<sup>26</sup> *Prot. Bk. Ros*, no. 987 (Ayr); C.S. 5/39 fol. 64v (Peebles); C.S. 15/1 (Dunfermline) notarial instrument drawn up by George Good. A year earlier, in March 1529, the bailies of the regality of Dunfermline met in the Tolbooth of that burgh: C.S. 5/39 fol. 141r.

<sup>27</sup> (S.R.O.) G.D. 1/413/1, Haddington Burgh Court Book (transcript).

<sup>28</sup> *Prot. Bk. Strathauchin*, no. 292. Interestingly Francis Bothwell, Otterburn's neighbour, was one of those specifically named as having supported him. Another large meeting of prominent men of the burgh was called to assemble in the Tolbooth in April 1516: *Edin. Burgh Recs.*, i., 160.

Andrew, Lord Gray, the justiciar, meeting in the burgh Tolbooth in the presence also of the justice clerk and the king's advocate.<sup>29</sup> In the Tolbooth of Dundee, in March 1531, Sir John Campbell of Lundy, sitting as justiciar depute for the earl of Argyll, heard a case presented against John Ramsay accusing him of robberies and other crimes.<sup>30</sup> The man of law Master Thomas Marjoribankis was fined in a justiciary court held in the Tolbooth of Edinburgh in July 1536 for failing to produce certain letters summoning his clients to appear before the justiciar charged with mutilation. Marjoribankis, having become surety to the justice clerk that he would bring the letters to court, incurred the same penalty prescribed for the offence of his clients and was therefore forced to pay a large fine although he had a right of recourse against the accused.<sup>31</sup>

Although most burghs had a Tolbooth by the early sixteenth century very few of these buildings survive in their original form. Many have been demolished, in whole or in part, and much re-building was done in the century following the reformation.<sup>32</sup> Nonetheless the pre-Reformation Tolbooth, because of its importance within the burgh as council house, court house and prison, was normally placed in a central location. In Edinburgh the Tolbooth had added significance. Built next to St Giles it was the site at which parliament assembled and where the lords of session met, as

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<sup>29</sup> (S.R.O.) G.D.150/269 (Morton Papers).

<sup>30</sup> (S.R.O.) R.H.6/1066.

<sup>31</sup> R.S.S. no. 2125. References appear to persons called before the justiciar in the Tolbooth in the *acta* of the lords of council; for example, John Allardes was called in 1526 'to underlie the law' for hurting David Balfour and drawing blood: C.S. 5/36 fol. 86r.

<sup>32</sup> Stell, 'Urban Buildings', in *The Medieval Scottish Town*, 63, states that the only surviving Tolbooth type structures date from the second half of the sixteenth century with the possible exception of the Tolbooth tower in Crail. See also *Tolbooths and Town-Houses: Civic Architecture in Scotland to 1833*, (Royal Commission on the Ancient and Historical Monuments of Scotland, 1996), 1-23.



well as the building used for sittings of the burgh court.<sup>33</sup> It was also used for sheriff court business and not only by the sheriff of Edinburgh: the sheriffs of other areas, such as Stirling or Perth, also occasionally fenced their courts in the Tolbooth of Edinburgh.<sup>34</sup> This explains why the lords of session, when sitting in Edinburgh, mainly used the Tolbooth but did not do so exclusively. It was perhaps a consequence of the diverse purposes to which that building was put that other venues for the lords within the vicinity of the High Street were occasionally used, such as the Chancellor's house, Holyroodhouse or the chapter-house of the Friar's Preachers.<sup>35</sup>

Stell points out that in architectural terms the Tolbooth was designed to be functional and to accommodate, as it had to, the town guard house and the weigh house as well as the council chamber and common prison.<sup>36</sup> Thus in February 1556 it was a conveniently short journey for Marion Craig who was led to the 'thevis hoill' to begin her six months' confinement for uttering slanderous words to the Senators of the College of Justice.<sup>37</sup> This functionality tended to diminish the aesthetic value of Tolbooths compared to churches which, as symbols of civic pride, were much more ornate; although it has been suggested that post-Reformation re-building, notably in

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<sup>33</sup> It was whilst on their way to the Tolbooth one morning for judicial business that the two regents James, Archbishop of Glasgow, and James, Earl of Arran, were attacked in the steet in the 'cleanse the causeway' affair on 30 April, 1520: 'Discours Particulier d'Ecosse', *Miscellany II*, (Stair Society, 1984), 127; Emond, *Minority of James V*, chapter six.

<sup>34</sup> For example, John Stewart, Sheriff of Banff, held his court there in August 1488 (*Prot. Bk. Young* no. 111) and Thomas Stewart, Sheriff of Perth, did the same in 1492 (*Prot. Bk. Young* no. 523). For a later example, a court of the sheriffdom of Dumfries was held in Edinburgh's Tolbooth in May 1552: *R.M.S.*, iv, no., 1621.

<sup>35</sup> For the Tolbooth see section (i) above. Holyroodhouse was used on one occasion at the king's command: C.S. 5/43 fol. 197v. But this use was not unique; see, for example, C.S. 5/35 fol. 131v.

<sup>36</sup> *P.S.A.S.*, (1981), 446.

<sup>37</sup> C.S. 6/29 fol. 14v.

Edinburgh, altered this trend.<sup>38</sup> Prior to the Reformation, just after Christmas 1554, there was a short period of building activity repairing and enlarging Edinburgh's Tolbooth and building a dwelling house for the jailer.<sup>39</sup> There was specific reference to the 'over hous' at this time and, two years later the burgh council convened in the 'Inner counsalhous of the ovir tolbuith'.<sup>40</sup>

Most legal business was performed below this level, on the first floor reached by a stairway from which general proclamations might be issued and where notices or tables might be attached to the Tolbooth door.<sup>41</sup> Not a great deal is known about the chamber in which the court sat at this time. There was clearly a bar in the court and there are numerous references to persons standing at it and addressing the lords.<sup>42</sup> The macers of the session controlled entry to the council chamber. Preserved in a manuscript in Edinburgh University Library are 'Directions frome the Lordis of Sessioun to the bailies of Edinburgh' in January 1604. These state that the bailies are

<sup>38</sup> R. Fawcett, *Architectural History of Scotland: Scottish Architecture from the Accession of the Stewarts to the Reformation 1371-1560* (Edinburgh, 1994) 278. Henceforth Fawcett, *Architecture*.

<sup>39</sup> *Old Edinburgh Club*, iv, (1911) 86.

<sup>40</sup> *Protocol Book of Alexander King* (transcript in Edinburgh City Archive), no. 109.

<sup>41</sup> *Fife Court Bk.*, introduction, xx. A good example of the way this was done occurs in 1542. A transumpt of a charter dating from the reign of William the Lion narrating a gift made to the abbey of Arbroath was to be registered in the books of the lords of session. A public edict was fixed to the Tolbooth door instructing all persons with an interest in the matter to appear and make their objections between 1 March (presumably when the edict was presented) and 24 March. No one appeared and so the transumpt was registered on 25 March: *Yester Writs*, no. 593. In ecclesiastical courts, it appears that notices, for instance of cursings (excommunications) might be 'tikkat...apoun kirk durris': C.S. 5/27 fol. 141v. This is in line with Romano-canonical procedure: Engelmann 'System of the Romano-canonical procedure' *Continental Legal History Series* vol. VII (London, 1928) §23.

<sup>42</sup> There also appears to have been a bar in the Tolbooth of the Canongate where the regality court of Broughton sat. In 1490 William Blakfurd, Thomas Bell's prelocutor, moved from the bar to where the judge was seated, a thing which 'Willelmus non tenetur facere neque removere suos articulos pedum ubi sui tali seu talones steterunt' (he was bound not to do nor to remove his toes where his heels stood), in order to examine a witness. On moving he 'came to the feet of the judge' indicating that the judge was sitting in an area that was elevated, looking down on those behind the bar of the court. This may also have been the position within Edinburgh's Tolbooth: *Prot Bk. Young* nos. 342, 343.

to appoint one or two officers to stand at the outer door of the Tolbooth when the lords were sitting to 'debarr all rascallis vagaboundis beggaris' and other undesirables from entering.<sup>43</sup> By that time they had been performing the same function for at least a century with apparent success.<sup>44</sup> The rule was that men of law may be permitted to enter with their clients but had to leave with them while the lords considered their case in privacy.<sup>45</sup> When a member of the court was successfully objected to he had to pass from his colleagues towards the bar and was not permitted to vote with them.<sup>46</sup>

The judges were seated behind a large table which, around September 1557, was recovered with four ells of green cloth.<sup>47</sup> Nearby perhaps sitting on 'a lang bynk' were, at the discretion of the chancellor, men able 'to leir practick'.<sup>48</sup> These would be the students and apprentices hoping to learn by observation. The scene which faced them would certainly have been colourful even apart from the green coverings on the lords' chairs and table and the bright livery worn by the macers.<sup>49</sup> The lords, both spiritual and temporal, may have worn gowns relative to their social standing and the

<sup>43</sup> (E.U.L.) Laing MS III - 388a fol. 105.

<sup>44</sup> I have only come across one instance of a person gaining access to the chamber without licence. This was 'the inoportune entering of robert betoun of creich within the counsalehous at his awn hand this being quiet...all partyis being removit': C.S. 6/29 fol. 53v (30 July 1557). Betoun was ordered to ward himself in Edinburgh castle for ten days and to pay £10 to be delivered to the grey friars. The lords also delayed the action which he had sought to pursue 'for the space of xxx sitting dayis'.

<sup>45</sup> The role of macers will be considered in the next section.

<sup>46</sup> C.S. 6/28 fol. 69v.

<sup>47</sup> *Edin. Accts.*, 206. This table may have been that ordered to be made in 1532 'ane burd quadrangulare or rownd about the quhilk that may sit xviii personis eselie' *A.D.C.P.*, 375. But there is reference to the 'the burd' used by the lords in 1527: C.S. 5/38 fol. 35v.

<sup>48</sup> Hannay, *College of Justice*, 36.

<sup>49</sup> The receipt of livery by macers is regularly recorded in the Accounts of the Lord High Treasurer. For the dress of officers of arms see Charles J. Burnett, *The Officers of Arms and Heraldic Art under King James the Sixth and First 1567-1625*, (Unpublished M.Litt. dissertation, University of Edinburgh, 1992), i, 11. The names of twelve virtuous and honest men chosen by the Lyon King of Arms to act as messengers on 12 July, 1527 are recorded in the *acta*: C.S. 5/37 fols. 157v-158r.

men of law may also have worn clothes appropriate to their position.<sup>50</sup> According to one sixteenth century source, which may record an Act of Sederunt, advocates who were not appropriately dressed would not be heard before the lords.<sup>51</sup> It is worth pointing out that the judges appear to have sat in an elevated position and it is likely that dress was used, as in the case of heralds and messengers, in order to reinforce the social hierarchy and impress upon litigants the lords' position as representatives of the king. It is known that on the eve of the Reformation the lords were kept warm during the long winter days by coal supplied to them by Thomas Hall.<sup>52</sup> But, beyond this, there seem to be few near contemporary references to conditions inside the chamber. It is clear that those who had business before the lords waited outside the hall to be called to their presence. When the lords, in August 1526, assigned two days in the week 'to compeire in the tolbuith and sitt apoun privelegit actiounis', they instructed that 'all persounis that has sic actiounis a do (sic) awayte apoun the said dayis that justice may be ministerit as efferis.'<sup>53</sup> A diagram of the layout inside the Tolbooth dating from 1629 indicates that there was an ante-room as large as the court room itself set aside as a waiting area for those with business before the court.<sup>54</sup>

<sup>50</sup> In a well known statute of 1455 it was laid down that 'all men of lawe that ar forspekaris for the cost haif habitis of grene of the sassane of any tunykill and the slevis to be opyn as a tabart' (*A.P.S.*, ii, 43, c. 12). Despite the detailed description of this outfit, there is unfortunately no evidence that this act was ever enforced.

<sup>51</sup> This source, a manuscript in Edinburgh University Library (Laing MS. III-388a), is dated by Atholl Murray to about 1581: Murray, 'Sinclair's Practicks' 91. It contains, in addition to a version of Sinclair's Practicks, a copy of various Acts of Sederunt from June, 1532. One undated entry 'Anent the habitis of the lordis and advocattis' is as follows: 'Item, that the lordis bayth spirituale and temporall at all tyme quhen thai cum to the counsalhous have syk gownis everie man efferand to his estait and utherwayes to have na voic and the advocattis inlykwess or ellis to haiv na audience' (fol. 6r). This act may conceivably belong to the 1530s but it does not seem to be recorded elsewhere.

<sup>52</sup> *Edin. Accts.*, 305.

<sup>53</sup> C.S. 5/36 fol. 91r.

<sup>54</sup> Lowther, *Our Journall into Scotland anno Domini 1629*, (Edinburgh, 1894). There was also a small conference room in which private business was transacted.

In Edinburgh a row of booths, the Luckenbooths, ran east from the Tolbooth along the north side of St Giles and down the High Street. In the early sixteenth century these booths, along with the booths rented within the Tolbooth itself, were described as ‘offices’ rather than shops; places where notaries and men of law might do business.<sup>55</sup> It is clear that from at least the mid-fifteenth century Edinburgh’s Tolbooth contained various booths which were let to burgesses. In 1482, at around the same time as a booth is first recorded as being used as a prison, the ‘eistmaist’ booth ‘*ex boreali parte pretorii*’ was let to Master Richard Lawson who was later to become justice clerk general.<sup>56</sup> Other men of law appear to have held booths within close proximity to the Tolbooth and the Luckenbooths and much business was recorded there. In 1532 there is reference to a booth on the north side of the Tolbooth which was the dwelling place of Thomas Marjoribankis.<sup>57</sup>

The luckenbooths, from 1508, tended to have wooden fronts in common with other buildings along the High Street facing north and forming what have been described as piazzas, cutting the width of the street slightly.<sup>58</sup> The booths themselves, half the width of the Tolbooth, appear like the Tolbooth itself to have been built on more than one level.<sup>59</sup> Thus in 1521 Adam Otterburn resigned in the hands of Gilbert

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<sup>55</sup> *P.S.A.S.*, (1886), 372.

<sup>56</sup> *Edin. Burgh Recs.* 41-2.; for reference to the prison, see *P.S.A.S.* (1886) 370.

<sup>57</sup> *Prot. Bk. Foular*, iii, no. 412. In 1557 agreement was reached concerning assythment between Robert Weir and Thomas Hammil for the mutilation of Robert’s thumb and forefinger in 1550. The agreement was made in the ‘tavern’ of Marjoribankis on the north side of the High Street; obviously not the same as the building mentioned in 1532, but Thomas Kincragy was among the witnesses: *Prot. Bk. Grote*, no. 93.

<sup>58</sup> *P.S.A.S.*, (1886), 362. It has been plausibly suggested that the road prior to 1508 was 30 feet in breadth being narrowed by 7 feet thereafter. This was still wider than the present day High Street at this point.

<sup>59</sup> There is reference in a charter of sale by James McCalzeane in February, 1523 to a low booth in the ‘Buithraw’: (S.R.O.) R.H.6/934. This presupposes that some booths were built on more than one level

Lauder, bailie, his booth 'under the stair of the land in Buthraw' together with another booth above the stair.<sup>60</sup> The typical town house of the period was built of wattle or timber and, although stone building among the more prosperous was growing more common by the sixteenth century the luckenbooths appear to have been at this time fairly flimsy structures.<sup>61</sup> In fact mention was made before the lords of council in December 1525 that the 'luckin buthis' had been blown down by the wind the previous Epiphany.<sup>62</sup>

In January 1531 there was a resignation of land in the 'Buithraw' on the south side of the High Street by a certain Andrew Borthwick with the consent of his curator, John Pardouin. Pardouin was himself one of the macers of the session but more notable is the fact that this land was next to areas belonging to Adam Otterburn, the king's advocate, and James McCalzeane, father of the advocate, Thomas.<sup>63</sup> James McCalzeane, himself a writer, had held his booth for at least a decade and seems to have been in receipt of rent from another booth nearby which interest he sold in February 1523 to the hospital of the Virgin in St Mary's Wynd.<sup>64</sup> Ultimately James resigned his interests in his two booths in the 'buthraw' on his death-bed to his

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as does the reference in 1556 to a 'lower' booth on the north side of the High Street next to the foreland of Master Thomas McCalzeane, James' son: *Prot. Bk. Alexander King*, no. 118.

<sup>60</sup> *Prot. Bk. Strauthauchin*, no. 330. Sasine of these booths was given to James McCalzeane and the booth beneath the stairs may have been that mentioned in the previous footnote. It is interesting to note that this booth stood between areas occupied by Alexander Mauchane, whose sister was married to Gilbert Lauder and whose son, also Alexander, had become a prominent advocate by the 1550s; and John Young, a notary public: *Prot. Bk. Alexander King*, no. 191. Lauder's son was Henry Lauder, another prominent advocate (for whom, see chapter eight). This illustrates well the already developing links between 'legal families' in Edinburgh at the time.

<sup>61</sup> Fawcett, *Architecture*, 282. For the significance of stone building as an indication of social standing see G. Stell, 'Architecture: the changing needs of society' in J.M. Brown, (ed.), *Scottish Society in the Fifteenth Century* (London, 1977), 163-4, 181.

<sup>62</sup> C.S. 5/35 fol. 169v. Mentioned again at C.S. 5/37 fol. 174r.

<sup>63</sup> *Prot. Bk. Foular*, iii, no. 284.

<sup>64</sup> (S.R.O.) R.H.6/934.



second son, Master Thomas, much to the annoyance of Thomas' elder brother.<sup>65</sup> Among these merchant booths on the north side of the Tolbooth included in 1520 one held by Francis Bothwell, one of the original senators in 1532.<sup>66</sup>

Although the leading men of law were no strangers to the Tolbooths of other burghs, the Tolbooth of Edinburgh in the sixteenth century was without doubt the centre of their activity in Scotland. Edinburgh's economic and political predominance dates at least from the reign of James III, a king who spent much of his time in Edinburgh and who oversaw the establishment there of the royal administration.<sup>67</sup> By 1567 it was acknowledged that 'of procuratouris and advocattis the gretast plentie ar at Edinburgh.'<sup>68</sup> What this meant in practical terms was illustrated in 1556 when the burgh of Aberdeen found itself in dispute with the Crown over the right to control fishing in the Dee. The burgh council sent six commissioners to Edinburgh 'to consult with men of law, experience, and knowledge, the best way for defence of the said actioun, and to constitut procuratouris, ane or ma, to that effect'.<sup>69</sup> It is significant that they did not send men of law; they sent burgesses to hire men of law. But the concentration of legal talent swarming around the central court had by then been evident for generations. As was seen in chapter two, burghs had long been sending representatives to Edinburgh to name advocates as their substitutes to act for the burgh in its important legal business.

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<sup>65</sup> C.S. 6/10 fol. 88r. The elder son, Sir James McCalzeane, designed as a chaplain, failed in a bid to have the resignation annulled in June 1538.

<sup>66</sup> *Prot. Bk. Foular*, ii, no. 75. For business being conducted in the chamber of James McCalzeane see *Prot. Bk. Foular*, iii, no. 734.

<sup>67</sup> Normal Macdougall, *James III: A Political Study*, (Edinburgh, 1982), 304, points out that Edinburgh, with its financiers, became the obvious choice as the permanent home for the royal administration.

<sup>68</sup> Hannay, *The College of Justice*, 138.

<sup>69</sup> *Aberdeen Council Register*, 294-5.



An impression of the busy activity in Edinburgh's Tolbooth can be given by reference to some of the business transacted there. When payment was made for lands alienated to Clement Litill, by Margaret Brown and her husband, in the Tolbooth in February 1520 no less than three men of law were on hand to witness the transaction: Robert Galbraith, James Carmuir and William Blakstock.<sup>70</sup> Galbraith is found in his chamber in Edinburgh, accompanied by John Lethame and others, witnessing a declaration by James McCalzeane in October 1520.<sup>71</sup> Adam Otterburn, common clerk of the burgh, would probably have operated much of the time in the early 1520s from the chamber of the official burgh clerk where his presence is recorded in 1532 when he appeared to make a renunciation, although he himself appears to have given up the office of town clerk in 1525.<sup>72</sup> There is a reference to Otterburn's chamber as the scene of an agreement made in 1524 in connection with the lands of Fordell held by the late king's advocate James Henryson. A resignation was drawn up in the house of Robert Leslie in Edinburgh but again there is no indication of where this house was and the instrument was written two years after Leslie's death.<sup>73</sup> Nonetheless in 1531 Leslie's wife, Christine Wardlaw, received with her sister conjunct-infeftment of a tenement near the Tolbooth on the south side

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<sup>70</sup> *Prot. Bk. Foular*, iii no. 46. This Clement was the father of the more famous man of law of the same name who was born around 1527/8, for whom see C.P. Finlayson, *Clement Litill and his Library* (1980).

<sup>71</sup> *Prot. Bk. Foular*, iii, no. 124. There is another reference to the dwelling in Edinburgh '*venerabilis viri magistri Roberti galbraith juresperiti*' in *Prot. Bk. John Meldrum*, (Haddington), (S.R.O.) B.30/1/1/ fol. 9v.

<sup>72</sup> *Prot. Bk. Foular*, iii no. 458. As to when Otterburn ceases to be found acting as town clerk, see J.A. Inglis, *Sir Adam Otterburn of Redhall*, (Glasgow, 1935), 26.

<sup>73</sup> (S.R.O.) R.H.6/1302 (28 September 1542). Elizabeth Wardlaw, whose sister Christine was Leslie's wife, received sasine of a land on the south side of the Tolbooth as heir to her deceased father Thomas in December 1521: *Prot. Bk. Strathauchin*, no. 383.

of the High Street.<sup>74</sup> The sisters then resigned their interest in the tenement and it was granted to Simon Marjoribankis, the brother of Thomas. Premises near the Tolbooth would have been at a premium for men of law and Leslie almost certainly had other accommodation nearby. Activity in the 1550s is recorded in the dwelling house of Thomas Kincraigie where notarial instruments were drawn up; these included the will of a certain George Dickson in 1557 made on his way to the Borders in contemplation of his death in war.<sup>75</sup> Similarly, a memorandum is recorded as having been drawn up in 1554 in the house of Master Robert Heriot, an advocate and one of the assessors of Edinburgh.<sup>76</sup>

## **(ii) Procedure before the Lords of Council**

The first thing required by any procedure is the creation of a dispute. In Scottish terms some 'richt' had to be infringed or some 'wrang' had to be done. By far the most typical type of action involved debt, spuilzie or wrongful occupation of land. The client became a client typically when someone else came onto his land and carried off something of value to him: a few bolls of wheat, barley or oats, or, if the client was a man of substance, perhaps some horses<sup>77</sup> or jewellery or even one of his daughters.

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<sup>74</sup> *Prot. Bk. Foular (Durkan)*, no. 322. Christine's mother, Marion Falcon, renounced her liferent in favour of her and her sister. Thomas Marjoribankis was one of the witnesses. Christine was married to Robert Leslie by the end of 1527: *Arbroath Liber*, ii, no. 674.

<sup>75</sup> *Prot. Bk. Grote*, no. 108; also nos. 37 and 186.

<sup>76</sup> *Prot. Bk. Grote*, no. 26.

<sup>77</sup> For example, C.S. 5/26 fol. 5v: wrongful intromission with 'tua gray horsis worth xx libratas & ane quhyte hors worth ane hundreth merkis'; C.S. 5/34 fol. 4v: spuilzie of 'ane blak horss price xl libratas ane gray hors price xl libratas and of utheris horsis...'.

The client, feeling aggrieved, now made contact with a man of law.<sup>78</sup> This might have been done directly by the client going to one of the booths in the vicinity of the Tolbooth mentioned earlier or by letter or intermediary. Once contact was made the situation would have been explained and the appropriate course of action agreed or, at least, the desire of a particular outcome expressed. Normally the achievement of this outcome involved the purchase of 'kingis lettres' from the chancery. A summons was issued and the action was tabled. This means that a note of the action was written in summary form in a table along with a list of other actions to be heard. The names of the parties would certainly be noted, perhaps a note of the pursuer's procurator may have been included with a brief description of the nature of the summons. At this time, or on a later occasion, the procurator would be constituted in line with the procedure described in chapter two.

Normally parties appeared by a single procurator, or in conjunction with only one forespeaker. But it was not uncommon to find two procurators in attendance, although sometimes only one would be a man of law. For example, Thomas Hunter appeared by his procurators Master Adam Hunter and Adam Otterburn.<sup>79</sup> James Dunbar's procurators were Sir Alexander Dunbar, vicar of Crail, and the man of law Master James Simson.<sup>80</sup> Sir William Murray of Tullibardine appeared by his son, Patrick, and Robert Leslie his procurators in an action of spuilzie brought against him by the abbot of Culross.<sup>81</sup> Two days previously Leslie had asked the lords for

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<sup>78</sup> The word client was a contemporary term. For example, there is a protest by Master Robert Galbraith 'for him self and his clientis': C.S. 5/34 fol. 129v.

<sup>79</sup> C.S. 5/30 fol. 23r: 15 June, 1517.

<sup>80</sup> C.S. 5/29 fol. 98v: 17 March, 1517.

<sup>81</sup> C.S. 5/30 fol. 239r: 18 March, 1518.

time to produce an annualrent by which William claimed that lands had been held of the abbey for a century. Leslie admitted that goods had been removed from these lands, but when pressed he refused to swear that he would not produce William's alleged deed. At this point there was no mention of William's son being present although he may have been. It is clear, and to be expected, that Leslie was the more active of the two. Slightly more unusual was a litigation involving Peter Carmichael who appeared by his wife, Eufame Wemyss, and Thomas Hamilton.<sup>82</sup> Hamilton had earlier acted as Eufame's forespeaker and, again, there is little doubt that he was in charge of presenting the case. The tendency to name family members in letters of procuratory was followed through in practice as these examples demonstrate, although their attendance in conjunction with an advocate indicates that their position was probably supervisory, and that the lead would be taken by the man of law. Some litigants preferred to use two men of law as their procurators. In May, 1517, Patrick Home was 'lawfully' warned to answer a summons brought against him by Elizabeth Martin, Lady Fastcastle, by his procurators, Master Thomas Hamilton and Master Robert Galbraith, 'personaly apprehendit'.<sup>83</sup> Clearly the macer who issued the warning could not personally apprehend Patrick. This does not mean that both Hamilton and Galbraith would have appeared on Patrick's behalf; if named jointly and severally, only one would have sufficed and, as it happened, neither did so. By contrast, Walter Tyry was represented by both William Scott of Balwearie and Robert Leslie in a case which he brought against James Fenton of Ogill although the procurators appeared merely to acknowledge that a summons raised by Walter

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<sup>82</sup> C.S. 5/30 fol. 148v: 25 August, 1517; Cf. C.S. 5/33 fol. 129v: 27 January, 1523.

<sup>83</sup> C.S. 5/30 fol. 5r: 22 May, 1530.

should be held *pro deleto*.<sup>84</sup> There are several other references to procurators in the plural acting before the lords of council. Lord Seton had it recorded that William Cranston's procurators had produced royal letters suspending a process of recognition.<sup>85</sup> Less ambiguously, Robert Galbraith and Thomas Kincraigie both appeared as procurators for John McGillies in a case in 1527.<sup>86</sup> There are also indications that men of law might take turns to act in cases. For example, John Lethame acted as prelocutor for Janet Rutherford in an action brought against her by Helen Rutherford.<sup>87</sup> During the course of the argument, reference was made to a concession granted by James Foulis, Janet's prelocutor in an earlier diet of the same case. The same litigant might use different men of law in respect of separate cases, even when those cases were concurrent. For example, Richard Maitland of Lethington used Robert Leslie as his forespeaker in an action alleging the spuilzie of two horses which he brought against William Duntreath of Edmonstone in September, 1523.<sup>88</sup> The following January, Thomas Hamilton was Maitland's forespeaker against John, Lord Hay of Yester.<sup>89</sup>

But however many procurators appeared, or were constituted, the litigant was required to ratify prospectively whatever his procurator may do in conformity with the authority granted under the procuratory. Most clients, trusting to God and the

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<sup>84</sup> C.S. 5/33 fol. 27v: 19 November, 1522. Walter had been served to the lands of Drumkilbo, a retour which James disputed. James had evidently obtained a decretet suspending the retour. Walter than issued a summons appealing against the decretet. It was admitted that this summons was for some reason invalid (*pro deleto*) and no answer should be made until a new summons was made.

<sup>85</sup> C.S. 5/24 fol. 47r: 3 December, 1512.

<sup>86</sup> C.S. 5/37 fol. 62v: 29 March, 1527. *McGillies v Richard Lekky of Wester Lekky and Malcolm, Lord Fleming*.

<sup>87</sup> C.S. 5/36 fol. 126v: 7 December, 1526.

<sup>88</sup> C.S. 5/34 fols. 4r-4v, 6v: 7, 9 and 11 September, 1523.

<sup>89</sup> C.S. 5/34 fol. 60v: 27 January, 1524.

justness of their cause, and relying on their man of law, now disappeared from the record. A minority, however, appeared later when their case was called.

### The summons tables

In the meantime the summons was served, calling the defender to appear on a certain day to hear and answer the allegations against him. The defender could then constitute his own procurators. Sometime before the appointed day the table, having been drafted, was fixed to the door of the Tolbooth for public display.<sup>90</sup> If the summons was not tabled on the Tolbooth door but was subsequently called then the whole process was null.<sup>91</sup> If the summons was tabled but the table was not fixed to the Tolbooth door or, presumably, otherwise displayed ('tikkatit'), then the defender might have a delay to answer the summons.<sup>92</sup> The lords of council, however, were on occasion not above proceeding with a summons that had not first been tabled,<sup>93</sup> or

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<sup>90</sup> According to John Lethame in one case a summons had been, on command of the king, 'tabulit on the tolbuith dur be ane tikkat and had remanit apoun the samin be the space of xvj dais with the mair': C.S. 5/37 fol. 49v. The abuse of using 'tikkets' - notices posted on the Tolbooth door - to promote the calling of a summons which did not appear in the table is adverted to by Hannay, *College of Justice*, 36. The pressure on the lords to keep to the order of the table rendered any process following upon a summons called by 'tikket' invalid according to a decret in February 1529 (C.S. 5/39 fol. 111v). Before this it would appear that the use of 'tikkets' *per se* was not an abuse and they seem to have been countenanced notwithstanding this decret. Sixteen days' notice is excessive; the norm, for actions involving the king, was set down in 1532 as being three days: *A.D.C.P.* 378. The three day notice period appears to have been used generally: for example, the earl of Cassillis was charged by the macer Oliver Maxton on Wednesday 13 August 1527 to defend himself against an action raised by Hugh Campbell on Friday 16 August. Campbell did not appear on 16 August and, a week later, Cassillis, having still not been called, entered the familiar protest that he should not be required to answer until freshly summoned: C.S. 5/37 fols. 205r, 213v. For a different contemporary use of the word 'tekkatit' see Denis McKay, 'Parish Life in Scotland 1500-1560', in *Essays on the Scottish Reformation*, (ed.) D. McRoberts, (Glasgow, 1962), 101.

<sup>91</sup> C.S. 5/34 fol. 82v. The summons, once tabled, may have been marked by the scribe in some way to indicate its appearance on the table; on one occasion Robert Leslie alleged that a certain summons was 'nethir tablit nor tikit': C.S. 5/34 fol. 110v.

<sup>92</sup> C.S. 5/37 fol. 56v: Robert Leslie 'askit instrument that the table was nocht on the dur & at he desirit viij dais'. Summonses could be 'tikkatit or tabilit' according to the rules laid down in 1532 although the 'tikketing' would presumably require to have been authorised: *A.D.C.P.* 378.

<sup>93</sup> E.g. C.S. 5/34 fol. 129v: 'Maister Robert galbraith for him self and his clientis protestit that gif the lordis wald proceid apoun the summondis raisit be alexander forestar aganis James m<sup>c</sup>calzeane and thame the samin nocht beand tabulit for remeid'

giving precedence to a summons which should have been heard later according to its position in the table.<sup>94</sup>

It was probably the wisest course to enter a protest just in case an opponent sought to advance the hearing of his summons. Robert Leslie, forespeaker for Gilbert McDowall, adopted this tactic when he protested that a certain summons raised by Patrick Sinclair against Gilbert had only been libelled within the previous two months and did not appear on the table and so his client should not have to answer it. Gilbert, although he had come to Edinburgh, had done so not to defend Patrick's summons but to defend other actions against him.<sup>95</sup> Incidentally the word 'libell' was used in both verb and noun form. The libel was a statement of the grounds on which the action was brought.<sup>96</sup> Its use may be exemplified by one particular action in which the not uncommon route to compromise through arbitration was followed.<sup>97</sup> Once the decret arbitral had been issued, however, one of the parties reclaimed from it back to the lords of session. The written reclamation functioned as a libel. However the reclaimer argued that, although he could not produce another libel apart from the reclamation, under the common law he could 'supple his reclamatioune and support and eike the samin as he plesit'.<sup>98</sup> In other words, he argued that he had the right to modify the grounds on which he claimed the decret arbitral was not valid. Whether he would have had a similar right to modify the libel of the summons is not

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<sup>94</sup> C.S. 5/41 fol. 20r.

<sup>95</sup> C.S. 5/36 fol. 133r. Leslie next unsuccessfully sought to argue, three months later, that he need not answer the summons until his client's expenses were paid: C.S. 5/37 fol. 60v.

<sup>96</sup> For the libel in the church courts see Ollivant, *The Court of the Official*, 100; Brundage, *The Medieval Canon Law*, 130.

<sup>97</sup> C.S. 5/37 fols. 161r, 164r.

<sup>98</sup> C.S. 5/37 fol. 194r; C.S. 5/38 fol. 83v.



clear; but it is doubtful whether a case once presented might be substantially modified.

Once all the summonses on a table had been called and dealt with, often simply by being continued to another day, the next table would be called. Sometimes things did not run smoothly. A summons might sometimes be called in a table before all the summonses in the old table had been called. This would invite the argument that the new summons should not be heard the old table being ‘unendit becaus ther is divers summondis theron as zit dependand nother under continewatioun nor desert’.<sup>99</sup> In one exchange, it was argued by Robert Leslie that a summons against his client was identical to a summons which had been ‘lang syne lyk taiblit’ by the same pursuer and which had later been renounced by Robert Galbraith on the pursuer’s behalf. This he offered to prove ‘be the taibler & certane lordis thir sittand’.<sup>100</sup> Despite this argument, and Leslie’s attempt to have the question of whether or not the second and the first summonses were identical referred to the pursuer’s oath, the lords ordained him to answer the summons on behalf of his client.

Despite frequent statements by the lords of session of their aspiration to keep to the order of the table, and reminders from men of law that summonses should only be called after the form of the table, actions which were tabled to be heard on a

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<sup>99</sup> *Morton Registrum*, ii, 287: 16 April 1543.

<sup>100</sup> C.S. 5/37 fol. 32v. This entry is difficult to decipher; the writing is slightly compressed and side notes have been added in a confusing way. The central issue, although not stated in the record, appears to be personal bar: Leslie seems to be arguing that the renunciation by Galbraith bound the pursuer and so an identical summons was not competent. As to the ‘taibler’ his identity is unknown although it appears here that he may have been one of the lords. It was presumably the tabler who recorded on each tabled summons the word ‘tabulit’ on the reverse side of the signet. There is another reference to him in 1532: *A.D.C.P.*, 378 and there are also references in 1528: C.S. 5/39 fols. 2v, 5v.

particular day might nonetheless be heard on another day.<sup>101</sup> For example, an action raised by the king was continued to a Monday when it was to be called and have process notwithstanding the fact, as the lords pointed out, that Monday ‘is nocht the kingis day’.<sup>102</sup> But it appears that this was done with the consent of the defender’s procurator. In another action a summons raised by the king and Robert Orrock and tabled to be called on the king’s day was called on another day. James Foulis protested on the defender’s behalf. Henry Spittall, procurator for Orrock, admitted that the summons was in the ‘kingis table’ but alleged it had been called on the king’s day and continued to the instant day and so should have process. Foulis responded that even though the summons had been continued his client had not been present and had not consented to the continuation and therefore under the law it should not be heard. In the end the lords decided that the process should be heard the following day.<sup>103</sup>

No copies of the table survive, but something is known of how it would have been set out. Firstly there appeared a list of those causes which were privileged. This might be a sizeable list: in 1525 Janet Rutherford wrote to the lords concerning a summons brought against her stating that the summons had been<sup>104</sup>

‘tablit on the tolbuthe dur in the latter end of the privilegiate table and thir is to be callit befor it in the said table fourty summondis or thirby... And I dissasentit expreslie to the calling of it quhill the remanent of the saidis tablit summondis befour it be callit’.<sup>105</sup>

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<sup>101</sup> For such reminders, see C.S. 5/36 fol. 112r and C.S. 5/37 fol. 74r.

<sup>102</sup> C.S. 5/37 fol. 55r.

<sup>103</sup> C.S. 5/37 fol. 41v.

<sup>104</sup> The summons related to the ‘retreting of ane decreet’ which Janet had earlier obtained. That explains why it was a privileged summons.

<sup>105</sup> C.S. 5/35 fol. 79r

Actions involving the king, strangers, recent spuilzie or rescinding of decrees or of letters for inordinate process and entry to superiorities were privileged.<sup>106</sup> In February 1538 Thomas Marjoribankis produced a royal letter before the lords granting to 'advocattis' the same 'privilege and ordour of table' as enjoyed by the lords of session and prelates thus widening still further the range of privileged causes.<sup>107</sup> The table then listed the remainder of the actions and this may have run to dozens of cases, covering the period during which the court was expected to sit.<sup>108</sup> On Wednesdays the king's business was attended to<sup>109</sup>; on Saturdays bills of complaint were dealt with so as not to interfere with the hearing of the tabled summonses during the rest of the week.<sup>110</sup>

<sup>106</sup> Hannay, *College of Justice*, 203, 213. In 1527 Robert Galbraith distinguished between the 'previleget table' and the 'unprevileget table' (C.S. 5/37 fol. 82r); taken together with the reference to the 'kingis table' given above and, in the 1540s, the 'puir folkis table' (*Sinclair's Practicks*, no. 249, fol. 88; see also no. 315, fol. 115) this may indicate either one table which was subdivided or, more likely, a number of tables all in use simultaneously and, presumably, all fixed to the Tolbooth door at the same time. There are instances of the 'tabillar' being instructed to place all summonses raised by and against a particular party in a separate table by themselves. An example of this occurred in November 1528 when Malcolm, lord Fleming, was unable to remain and 'vaik' upon the session because of unrest in his own lands and actions concerning him were all put in a separate table to be called at a later date so that he may depart the king's service temporarily to restore order at home: C.S. 5/39 fol. 5v.

<sup>107</sup> *A.D.C.P.* 465. Saturday was the day on which summonses in 'the prelatiss tabill' were called early in Mary's reign: C.S. 7/1/1 fol. 173r.

<sup>108</sup> In one case Robert Leslie that a summons should not be called because it was 'ferr doune in the table' and there were 'mony aboutne uncalled': C.S. 5/36 fol. 152v.

<sup>109</sup> C.S. 5/35 fol. 50r (21 June, 1525). Any decree given on a summons called on a Wednesday that did not involve the king was to be null. There seems to have been some doubt about this before the lords clarified the matter. On 19 June Henry Spittal argued that a summons issued against his clients was principally at the king's instance and had been called on a day that was 'nocht the kingis day in the sessionne' and so should be called again when that day arose. He specifically alleged that calling the summons on the wrong day 'was contrar the tenour of the act of parliament maid apoun tabuling of summondis'. Gilding the lily, Henry 'presentlie requirit the clerk of registre and his deputis to deliver to him the autentik copy of the act of parliament maid laitlie anent tabuling of summondis' only to meet the response that, in fact, 'thir was nocht sic ane act': C.S. 5/35 fol. 44v. In August 1526 the lords assigned Wednesday and Friday weekly to privileged actions: C.S. 5/36 fol. 91r but in May 1532 Fridays were set aside for the king's matters: *A.D.C.P.* 375.

<sup>110</sup> C.S. 5/35 fol. 53r.

## The initial trial procedure

When the day scheduled for the hearing of the case arrived, and after having been summoned himself by the ringing of the bell in St Giles early in the morning, the Chancellor would have begun by dealing with cases continued from the last diet. Then he would have read out the new summonses in the order in which they appeared in the table.<sup>111</sup> If neither party or their representative appeared when the case was called the chancellor would simply call the next summons.<sup>112</sup> The macer positioned on the floor of the chamber would then be ordered to call each case several times at the outer door of the council house.<sup>113</sup> In the *acta* the absence of a litigant is always indicated by the formula that he or she was ‘lauchfullie warnit to this actioun oftymes callit be ane maissar and nocht comperit’.<sup>114</sup> When the case was called, it perhaps would have been this macer who conducted the parties and/or their men of law to stand before the bar of the court.<sup>115</sup> As they entered they passed through the outer door, guarded by two macers, and then an inner door, again guarded by two macers. No one else could enter without leave of the court on pain of

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<sup>111</sup> This appears to have been the customary practice. The treasurer of Edinburgh paid ten shillings to ‘Hanislie’ (Ainslie?) the bell-ringer for ringing the bell at nine in the morning for convening the lords in the Tolbooth in 1556/7: *Edin. Accts.*, 206. It appears as though the lords convened at eight in the morning from 1 March to 1 August, except on ‘dayes of preiching’ when they convened at nine (until eleven); and in the winter, from 4 November until 1 March, they convened at nine (until twelve). The seventeenth century source of this information, Lord Fountainhall’s Collection - ‘Notes and Observations gatherit out of the buikis of sederunt of the Lordis of Session’, gives an act of sederunt but sadly is not specific as to its date: (E.U.L.) Laing MS III - 388a fol. 2v. It should be added that the lords regularly also sat in the afternoons, often with the sederunt *post meridiem* differing slightly from that *ante meridiem*.

<sup>112</sup> This might result in a case lower in the table being reached earlier than expected. The chancellor on one occasion asked that it be recorded that he had read all the summonses in the table down to the case of the Heirs of Blacater v Master Patrik Blacater and that no parties had appeared to pursue or defend in any of those cases: C.S. 5/35 fol. 83v.

<sup>113</sup> C.S. 6/1 fol. 98r which refers to a party ‘beand lauchfullie callit at the counsalehouss dure divers tymes’. Provision was made for a bell to be used to call the macers: *A.D.C.P.* 375.

<sup>114</sup> This phrase, or variants of it, is found throughout the *acta*.

<sup>115</sup> C.S. 6/2 fol. 203r

being summarily warded.<sup>116</sup> So, for example, in July 1540 the king's advocate and another procurator had to be admitted by permission of the lords to plead defences in an action in which their clients had an interest.<sup>117</sup>

There were various possibilities at this stage. The client was not present but the procurator was; the procurator was present but so was the client; the procurator was not present but the client was; the client had not constituted a procurator but was present to represent himself; or the client was simply not present at all and there was no procurator to represent him. If the pursuer or his man of law failed to appear or, for some reason - such as excommunication - could not appear, then the defender would protest that his client should not be required to answer the summons until he had been freshly summoned and that his expenses should be met by the other party.<sup>118</sup> In one case Master Thomas Marjoribankis complained that he 'had remanyt lang upoun the calling' of a summons of recent spuilzie and the lords admitted his protest that his client's expenses should be paid and a new summons issued.<sup>119</sup> But this was relatively unusual: for obvious reasons, it was far more common for the defender or his procurator to make no appearance at all. Another possibility which might arise was that both parties, having appeared ready for their case to proceed, were not heard because the lords refused or failed to call the summons. Robert Galbraith, procurator for the poor tenants of the abbey of Glenluce, protested that if

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<sup>116</sup> C.S. 5/42 fol. 53r.

<sup>117</sup> C.S. 6/13 fol. 107r

<sup>118</sup> An example of a pursuer repelled '*ab agendo*' due to cursing is found at C.S. 6/1 fol. 76r.

<sup>119</sup> C.S. 5/42 fol. 122r. Such protests were extremely common and almost always admitted by the lords. They provide an example of men of law seeking *not* to prolong litigation by demanding that the party which has kept the defender waiting be required to go to the expense of starting his action again by obtaining a new summons. Attempts by lawyers to accelerate proceedings were not uncommon in the church courts: see 'Ethical Standards for Advocates and Proctors', in R.H. Helmholz, *The Canon Law and the Law of England*, (London, 1987), 49-50.

his clients suffered any detriment because of the failure of the archbishop of Glasgow (i.e. the chancellor) and the rest of the lords to call the case then this should be blamed on the fault of the lords. The case, a long standing dispute with the bishop of Galloway, had already been continued on several occasions and the day on which Galbraith made his protest was the day that had been assigned for final judgement. Galbraith stated that although he had remained until six o'clock in the evening he had been unable to obtain process in the matter. Consequently, as he alleged, the lords had thereby incurred excommunication in terms of papal letters which had been granted to his clients and previously produced in court. This was an unusual protest and, if Galbraith is to be believed, the lords failure to call the action was wilful rather than due to the pressure imposed by a high case-load.<sup>120</sup>

Little is known about the contemporary seating arrangement in the Tolbooth or the Chancellor's residence or wherever else the lords happened to be sitting.<sup>121</sup> The pleaders - amateur or professional - stood at the bar and presumably this was an area facing the seated lords who generally numbered at least six in the 1520s. Lords, clerks, macers and pleaders would all, however, have required space, although the number of lords of session actually in attendance varied: for example, in one case involving an act of parliament controlling the importation of books into Scotland, the lords present held that 'thai war our few at that tyme to deliver thirapoun the said act'.<sup>122</sup>

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<sup>120</sup> C.S. 5/37 fol. 78r.

<sup>121</sup> See section (i) above.

<sup>122</sup> C.S. 5/26 fol. 180v. This was not an isolated example of a deficiency in the numbers of the lords of council in the sederunt: see, for instance, C.S. 6/28 fol. 80v, where Mr James McGill 'becaus thai war nocht now of nomer desirit the lordis to byd quhill that war sufficient nomer', and C.S. 5/43 fol. 118v, where in answer to the claim that no decision should be made until all those ordained to the



## Macers

Of those in attendance before the lords the evidence indicates that macers were not necessarily the lowest in status or ability: James Johnstone, one of the macers of the session, may possibly have been a university graduate, was certainly a bailie of Edinburgh and was also the father of Master William Johnstone, one of the original general procurators to the College of Justice.<sup>123</sup> As a class of royal servants macers are often grouped with the heralds and messengers, men of no mean ability in their own right, and it would be wrong to underestimate their social standing.<sup>124</sup>

The most important duty incumbent upon the macers was simply to arrive at the council house on time. In 1556 the lords decided that any macer who failed to arrive at eight in the morning or, at the latest, after the bell had ceased ringing, ‘sall haif na part of the casualeteis that salhappin to fall for that day’.<sup>125</sup> Instead, any casualties were to be divided only amongst those macers who had appeared on time. When they did arrive on time, the macers had an active role during the course of the court day not only in ensuring order but also in charging witnesses and parties to attend and,

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session were present it was alleged that the most part of the lords temporal ordained for the session were present. In November 1532 three extraordinary lords were named to be ‘ekit’ to the lords ‘becaus thar is divers deid sum seik & sum away’: C.S. 6/2 fol. 5v.

<sup>123</sup> His graduate status is doubtful although he was referred to as Magister Jacobus on at least one occasion: *R.M.S.*, iii, 1907. As to his link with William Johnstone, William’s father was certainly called James and he was a burghess of Edinburgh: *R.S.S.*, iv, no. 909. James was a bailie of the burgh in 1524-5: *Prot. Bk. Strathauchin* (transcript) no. 542; and as early as 1516 his name appears on a list of prominent Edinburgh men, including the provost, Lyon king of Arms, Adam Otterburn and Robert Galbraith, summoned to the Tolbooth to resolve a complaint made to the council concerning tenants of the Burghmuir: *Edin. Burgh Recs.*, i, 160. It is possible that James Johnstone is to be identified with a man of the same name, designed commissary clerk of Edinburgh, who appeared in a witness list dated 3 September 1542: *Laing Chrs.*, no. 465.

<sup>124</sup> For example, *A.P.S.*, ii, \*423. For the status and ability of heralds see Edington, *Lindsay*, chapter 2. It was noted in the *acta* at the end of March 1514 that John Scheves had sworn the great oath in parliament and had received his ceremonial mace from the chancellor: C.S. 5/26 fol. 122r.

<sup>125</sup> C.S. 6/29 fol. 19r.



more occasionally, in commanding parties on the lords' behalf to enter themselves into ward.<sup>126</sup> These activities might be done officially, having been ordered by the lords, or privately. For instance, on the morning of 24 October 1523 a commission was issued to the bailies of Edinburgh, the justice clerk and others to enforce an act of parliament concerning the malt makers of Leith. An 'officer', probably a macer of the court, was ordered to charge the malt makers who failed to observe the terms of the Act to appear at two in the afternoon of the same day to answer for their contempt on pain of rebellion.<sup>127</sup> On at least one occasion the lords sent a macer to advise the admiral to appear personally, or to send a deputy, to sit with them to hear a particular case, and to make it clear to him that in the event of his non-appearance the lords would proceed without him.<sup>128</sup> John Pardouin, a macer, seems to have held an 'inquisitioun' into the question of whether the city of Glasgow should pay tax to the king.<sup>129</sup> Macers might also be appointed sheriffs *in hac parte* along with men of law; thus in 1539 Hugh Rigg, James Johnson and John Pardouin are found exercising that office<sup>130</sup> and in 1528 John Pardouin, under commission from the king, held a court of the sheriffdom of Ayr in the Tolbooth of Edinburgh.<sup>131</sup> But despite their public role in maintaining the peace in and around the chamber, the macers themselves were not above breaching it. In May 1546 a fierce dispute between two

<sup>126</sup> An example of this latter duty being carried out by a macer occurs in February 1526 when lord Sinclair was ordered to ward himself in Edinburgh castle on his own expenses; the provost of Edinburgh was to pass with the macer and convey lord Sinclair to the castle: C.S. 5/35 fol. 200r.

<sup>127</sup> C.S. 5/34 fol. 22v. Examples of parties being 'callit be ane massyr' to appear are fairly common e.g. C.S. 5/34 fol. 6v (Master Richard Bothwell called by a macer to answer a summons brought against him by the abbot of Holyroodhouse).

<sup>128</sup> C.S. 5/28 fol. 57v. The Admiral protested.

<sup>129</sup> C.S. 5/43 fol. 8v. The king's advocate, acting also in the name of the burghs of the realm, protested that they were not warned to this inquest and so it 'suld have na faith'.

<sup>130</sup> R.M.S., iii, no., 1907. In 1527 four macers, James Johnstone, Oliver Maxton, David Purves and John Pardouin were appointed sheriffs of Edinburgh *in hac parte*: C.S. 5/37 fol. 82r.

<sup>131</sup> *Laing Chrs.*, no., 365. In the action for which this commission was granted appeared both Robert Galbraith and James Foulis, men of law who would have been well known to Pardouin.

macers at the Tolbooth door resulted in one of them, Thomas Wauchop, being suspended from office during the will of the lords.<sup>132</sup>

In the private sphere, John Spence of Mariston, who had received a summons at the instance of Alan Jameson, instructed a macer to warn Alan to appear before the lords and pursue the summons on a particular day when John would be ready to answer it.<sup>133</sup> Sir John Campbell of Lundy narrated that a macer had warned Master Robert Leslie, the man of law, to produce letters which he had obtained suspending letters of horning previously purchased by Campbell against Leslie's. In the event Leslie was unable or unwilling to produce the letters and prove that they had been properly obtained.<sup>134</sup>

Another side to the role of the macer can be seen in the case of Pierre Ligeoné, a French wine-merchant involved in a brawl in his lodging in Leith during which he was struck on the face with a candlestick.<sup>135</sup> The constable depute's officers apprehended Pierre, but not his assailant, and Pierre appeared in the Tolbooth only to have the constable-depute of the burgh assign another day for the hearing of his case and take caution for his appearance. On the appointed day Pierre arrived at ten o'clock and remained

'quhill neir xij houris and quhill the provost & ballies raiss furth of jugement & past to thair dennaris and quhill the keparis of the tolbutth removit him furth of the samyn and closit the duris'.

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<sup>132</sup> C.S. 6/28 fol. 54v.

<sup>133</sup> C.S. 5/41 fol. 20r

<sup>134</sup> C.S. 5/40 fol. 9r

<sup>135</sup> C.S. 5/28 fol. 83r

The constable-depute then allegedly appeared and, on finding Pierre absent, seized his opportunity to fine him and his cautioners for non-appearance. Pierre was promptly found and imprisoned in the Tolbooth until a fine of ten pounds was paid. This obliged him to make a supplication to the lords of council, offering to call the bailies as witnesses to his presence in the burgh court on the appointed day. It is clear that, but for the action of the macers in clearing the chamber during the midday meal, Pierre's unfortunate predicament would not have arisen, although clearly this was one of the routine functions exercised by 'the keparis of the duris'.

Precisely how these functions were performed is illustrated by the preservation of a supplication among the *acta* of the lords.<sup>136</sup> The content of the supplication is unimportant although it was addressed to the lords from the 'skipparis & awnaris' of the ships of Scotland against Mr. Charles Fotheringham concerning the endowment of St Ninian's chapel in Bruges, the chaplain of which being Charles' brother Alexander. As generally occurred the procedure taken was recorded by the macer on the dorse of the supplication. Firstly:

'The lordis ordanis ane massyr to pass & warne this partij complenit on to compeire before thame tomorne before none to ansyr to this complent that justice may be ministerit as efferis'.

Below this, in another hand, is the following:

'The xxiiij day of Julij j<sup>m</sup> v<sup>c</sup> xxvj zeris I Edinburgh massyr past at the command of the lordis of consale be thir deliverance above writtin & warnit charles fotheringhame personaly apprehendit to compeir befor the saidis lordis tomorne before none to ansuer to this complaynt eftir the forme of the said

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<sup>136</sup> This supplication is not unique. Several similar examples are to be found elsewhere in the *acta* and also in the series C.S. 15.

deliverance And this I did befor thir witenis david gourlay david rollok & pate  
cuthbertsone with utheris divers And for the mare witnessing to this my  
execution I have affixt my signete'.<sup>137</sup>

The identity of this 'Edinburgh massyr' does not seem to be known but four months later his successor appears as a complainant before the lords producing a letter from the king on his behalf.<sup>138</sup> James Johnstone, alias Edinburgh macer, was admitted in the November parliament to be 'ane of the vj massaris' and on 29 November James gave letters to the lords confirming his position and entitling him to the fees of his new office.<sup>139</sup> But James was not admitted immediately and the very next day the king wrote to the lords seeking his immediate entry into office. The king's letter was presented to the lords on 1 December and obeyed. The speed with which the affair was settled reflects the importance of the macer in the administration of justice.

#### **Audience in the council chamber**

Outside the council chamber the parties and their procurators would have waited before being called to transact their business. In 1511 it was complained that justice was being hindered by the 'multitud of peple that cumis in the consale hous makand gret noys and misreule'; although many of these people would have been engaged in commerce rather than law, with the Tolbooth the centre of Edinburgh's bustling

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<sup>137</sup> C.S. 5/36 fol. 59Av.

<sup>138</sup> C.S. 5/36 fol. 110v. Johnstone is mentioned again in May 1532: C.S. 6/1 fol. 9v. The names of the other macers rarely appear although Oliver Maxton is named as one (C.S. 5/36 fol. 111r) as is John Pardouin (e.g. C.S. 6/1 fol. 96r), David Purvis (e.g. C.S. 5/37 fol. 82r) and Charles Campbell (e.g. C.S. 5/35 fol. 148v). Whether their number was always six or varied is not clear. An act of sederunt in 1555 refers to order in the council house depending upon five or six macers: A.S. (Campbell) 58; however there is a reference to 'all the five maseris' in April 1556: C.S. 6/29 fol. 19r.

<sup>139</sup> Johnstone was a burges of Edinburgh. In March 1518 he is referred to as having returned from Lombardy having had dealings with Jerome Frescobaldi's bank: C.S. 5/30 fol. 234r.

market place.<sup>140</sup> There were occasional supplications to the king by those in his service who could not spare the time to 'waik (wait) apoun the table & diettis' of the session and so requested their cases to be heard immediately.<sup>141</sup> Of those attending the legal process some will have waited longer than others.<sup>142</sup> In December 1516, Robert Leslie, procurator for Thomas Ogilvy and Alexander Annand, protested that his clients had been summoned to 'ane schort day' in October at the instance of John, Lord Hay of Yester, and had remained since then waiting for the summons to be called but lord Hay would not pursue it.<sup>143</sup> The parties awaiting the pleasure of the lords of council were as diverse as the business which they sought to bring to the lords' attention. They ranged from Marion Andrew, waiting with her mother Janet Lethame to petition for '*curators ad lites*' to be appointed for the duration of her minority;<sup>144</sup> to leading figures in the realm such as the Marischall,<sup>145</sup> and experienced men of law receiving last minute instructions from anxious clients until called to appear. Men of law may have waited outside the lords' chamber hoping to be admitted into actions in which their clients potentially had an interest in order to plead defences or to make protests.<sup>146</sup>

<sup>140</sup> Hannay, *College of Justice*, 21. H.L. MacQueen, 'The Temples of Themis', unpublished address to the Old Edinburgh Club, 1996.

<sup>141</sup> C.S. 5/37 fol. 12r, an example in which Archibald Douglas of Kilspindie, the king's treasurer, was granted the privilege of having his summons called 'without ony delay of table or diettis' in a letter from the king to the lords because 'of oure special service daily & hourlie to be done to ws'.

<sup>142</sup> For example see the case cited at footnote 26 above, where Master Thomas Marjoribankis complained that he 'had remanyt lang upoun the calling' of a summons: C.S. 5/42 fol. 122r.

<sup>143</sup> C.S. 5/28 fol. 68r. Walter Scott of Branxholm was also called to underly the law 'at ane schort day' (C.S. 5/37 fol. 191r) i.e. he was summoned to enter appearance at short notice.

<sup>144</sup> C.S. 5/34 fol. 160v

<sup>145</sup> C.S. 5/40 fol. 28v

<sup>146</sup> For example, C.S. 6/13 fol. 107r: Henry Lauder, king's advocate and Hugh Rigg, procurator for William Cunningham of Glengarnock 'desirit to be admittit for thir enteres' to an action for spuilzie involving parties who were not their clients. They then put forward defences in the matter. At this date Lauder, as king's advocate, had been granted the right to be present in the chamber but Rigg had not.

The man of law had no greater right to be present than his client had. Once the arguments had been made, and the client had to withdraw while the lords debated the merits of the case and decided upon their interlocutor, the man of law had to withdraw as well. They were only permitted to return once the lords were agreed and then only to hear the interlocutor being pronounced. The length of time which it took to present an argument cannot readily be deduced from the records.<sup>147</sup> The clerks recorded major procedural steps but most of their entries record occasions upon which one or other side 'askit instrumentis', or made protests. Asking instruments was simply a technique to ensure that the clerk would record the procedural step then being taken, or the particular objection being raised, and so preserve it for future reference. It was commonly done even outwith the context of a legal dispute. Registering a deed for preservation, in which the maker of the deed or his procurator appeared and asked the lords to register the deed, was very common and the text of numerous deeds are copied into the *acta* for this purpose. They would have been copied either by the clerk register himself or, more likely, by his depute Sir Alexander Scott.<sup>148</sup> Whether parties entered with their own notaries is doubtful although an act of parliament in 1540, regulating the practice in sheriff courts, suggests that parties did bring their own notaries with them and that this caused confusion with conflicting instruments being recorded.<sup>149</sup> The content of registered deeds varied greatly: for example, they might involve inhibitions - where a party

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<sup>147</sup> In one case, presumably to save time, a charter which was produced was 'held as redd': C.S. 5/26 fol. 118r.

<sup>148</sup> Scott appears by name in March 1525/6 along with Mr James Douglas another notary: C.S. 5/36 fol. 8v; he appears designed as 'deput to the clerk of Reg[ist]re' a year later: C.S. 5/27 fol. 55r. For a deed registered by the Clerk Register himself see C.S. 5/37 fol. 53r.

<sup>149</sup> *A.P.S.*, ii, 360.

refused to alienate his goods or heritage without the consent of another<sup>150</sup> or they might spell out the terms of an agreement to submit a dispute to arbitration.<sup>151</sup>

### Initial objections

The first thing a procurator might do was to raise an objection against the lords hearing the case. This could involve one of two things: attacking the jurisdiction of the lords or objecting to one or more lords as being partial judges. There are several examples of objection being raised to the lords' jurisdiction. Most obviously this might be done on behalf of a churchman. Thomas Marjoribankis, procurator for the abbot of Holyrood, called to warrant an assignation to John Carmichael of the vicarage of Crawford-Lindsay, alleged that the 'becaus the said abbot was ane spiritual man he suld nocht be haldin to ansuer in the said mater befor the lordis but befor his jugis competent'.<sup>152</sup> The argument, as a large proportion of such arguments appear to have been, was unsuccessful.

Failure to object to the court when initially raising exceptions against the summons would result in the allegation that the exception could not be raised at all. Dilatory exceptions, that is, objections against the form of action, had to be raised first and in a particular order with exceptions against the judge to be made first.<sup>153</sup> So when

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<sup>150</sup> E.g. C.S. 6/13 fol. 134v. In one example (C.S. 5/40 fol. 22r) Walter Borthwick, describing himself as a child of eighteen or nineteen, and intent on going to France or elsewhere to learn the use of 'merchandise', stated that because numerous young men in the past being far from home had been seduced into parting with their lands he sought to be interdicted from alienating his heritage without the consent of his nearest friend, George Henryson of Fordell.

<sup>151</sup> E.g. C.S. 6/13 fol. 204v

<sup>152</sup> C.S. 6/1 fol. 37v.

<sup>153</sup> See H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), 77 and 'Pleadable Brieves, Pleading and the Development of Scots Law', *L.H.R.*, iv, (1986) 403.



Robert Leslie objected to a summons on the basis that it had been called without first appearing in the table, his opponent James Foulis protested that he should not then be allowed to raise an exception against the judges.<sup>154</sup> That explains why Thomas McCalzeane in one case protested that should the principal matter come to disputation he should still be allowed to speak against the lords in regard to their ‘parciale consale’.<sup>155</sup> He specifically wanted no other matters discussed until he had the court’s interlocutor on the issue of partiality; thus, in the formulation used at the time, he would avoid passing from that exception by default through raising another. If an exception once raised was repelled by the lords, however, then the rule was that any further exceptions which the procurator wished to raise all had to be made together at one time.<sup>156</sup>

As for allegations that particular lords were biased these are comparatively rare. In an action between Hugh Campbell, Sheriff of Ayr, and William Cunningham, Master of Glencairn, objections were raised to three of the lords. William showed that the prior of St Andrews confessed that he had ‘advertisit & informit the shireff of airis procuratour how he mycht have ansuerit better to the resounis contenit in the libell na (than) he did’.<sup>157</sup> This made him ‘parciale & suspect’ in William’s submission. The lords agreed and removed the prior from voting. Two days later the prior himself appeared on the sheriff’s behalf questioning whether the abbots of Kelso and Dryburgh had given ‘parcial counsale’ in the matter.<sup>158</sup> The abbot of Dryburgh

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<sup>154</sup> C.S. 5/36 fol. 112r.

<sup>155</sup> *Morton Registrum*, ii, 283.

<sup>156</sup> C.S. 5/38 fol. 118r.

<sup>157</sup> C.S. 5/43 fol. 152v

<sup>158</sup> C.S. 5/43 fol. 157v

admitted that he was kin to the sheriff's children and according to William's procurator, as the record states, the abbot 'said I will nocht purge me of parciale counsale'. However he appears to have sworn on oath that he was not partial and the lords do not seem to have removed either abbot from the sederunt at that time. It is interesting to note, however, that three months later the sheriff protested that no lords should vote in the matter 'except thaim alanerly quhilk was chosin of befor to the session that arguint the mater & had the samin ripe in thir hedis'.<sup>159</sup>

The most obvious member of the sederunt who could be attacked on the ground of partiality was the king's advocate. In February and March 1547 the then advocate, Henry Lauder, was twice successfully challenged as a judge.<sup>160</sup> On the first occasion the ground of challenge was that the action in question was brought by him at the king's instance; for that reason the lords instructed him to rise and pass to the bar of the court and not vote in the matter. The second challenge was different: it involved a case in which Lauder had represented one of the parties at a previous diet. The lords held that he should not vote in what was now the second instance of the cause. Lauder protested against this decision and 'purgit himself be his aith that he haid nocht gevin parciale consale in this mater'. Clearly he had been acting as procurator in a private capacity; his response seems to indicate that he had given counsel but that this did not necessarily make him biased. Lauder's reaction suggests that his initial involvement had been viewed by him - and might reasonably be viewed by his colleagues on the bench - as purely a business transaction. The fact that Lauder

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<sup>159</sup> C.S. 5/43 fol. 194r

<sup>160</sup> C.S. 6/28 fols. 69v, 79v.

seems to have immediately begun once again to represent the client in question does nothing to argue against this view: given that he had to pass to the bar and could not vote in the matter, there was no reason why his services as a forespeaker should not have been secured.<sup>161</sup>

In fact the first thing Lauder did when he passed to the bar was to object to his opponent, alleging a lack of title or interest to sue. This was a familiar tactic and in the case in question Lauder asked that his opponent, Sir John Campbell of Lundy, produce his title for verifying his interest in the matter. When Campbell produced an apprising containing an assignation of the lands in dispute to Campbell this was accepted by the lords although Lauder's client, John Lord Ogilvy, continued to object. Matters appear to have become rather heated since Campbell complained that Ogilvy had allegedly threatened that should 'sir jhone come in the northland he suld nocht cum sa wele hame agane' although, despite calling several witnesses, he failed to prove that this statement had been made.<sup>162</sup> So common was the practice of questioning an opponent's title and interest to sue that Master Archibald Crichton, procurator for James Beaton, Archbishop of St Andrews, alleged that James' nephew the abbot of Arbroath had no interest to reduce letters issued in favour of the archbishop seeking half the fruits of his abbey.<sup>163</sup> Failure to mention by what right or interest a summons was being pursued might result in the lords ordering a new summons to be libelled.<sup>164</sup>

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<sup>161</sup> C.S. 6/28 fol. 80r. The client in question was John, lord Ogilvy. It made sense for Ogilvy, as it had made sense for the sheriff of Ayr, to employ a disqualified lord of council to represent him.

<sup>162</sup> C.S. 6/28 fol. 82r.

<sup>163</sup> C.S. 6/1 fol. 119v. For a short discussion of this dispute see Sanderson, *Cardinal of Scotland*, 22-3.

<sup>164</sup> As happened to William, master of Glencairn: C.S. 5/43 fol. 106v.

## Litigation strategies and the use of evidence

In one case the lords, notwithstanding an exception that the pursuer had no title to sue, ordered the defender to answer ‘the haile summondis’ (i.e. the substantive allegations) *affirmatione vel negative aut excipiendo*.<sup>165</sup> As this phrase suggests, the procurator had several strategies available to him: he might admit the truth of an allegation, in which case his opponent would ask for an instrument to be made recording this concession, or deny something entirely in which case he himself would ask for an instrument to be made.<sup>166</sup> He might choose not to deny something but to challenge its relevance.<sup>167</sup> Occasionally the lords would assign a particular day on which to hear argument concerning the relevance of allegations contained in a summons. In February 1525 the lords assigned the next Thursday to the laird of Balbirny ‘to produce sic lawis and resounis as he will verify that the punctes of the summondis raisit be him aganis helene stewart is relevant’. In the meantime, Helen and her forespeaker were to produce authority showing that the summons was not relevant so that the ‘lordis may be avisit with baith thair lawis and resounis’.<sup>168</sup> Objections to the relevance of a summons might be of a technical or complex nature. One summons was objected to by Hugh Rigg because it was ‘coniunctlie libellat’ by both the king and William Gourlaw. Gourlaw, having renounced his interest to proceed and given it over to the king, had thereby rendered the summons inaccurate, a technicality which in Rigg’s submission made it invalid.<sup>169</sup> In another case Henry

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<sup>165</sup> C.S. 5/39 fol. 26v. This clearly illustrates the preliminary (or dilatory) nature of an exception as to title.

<sup>166</sup> An example of a concession is given at C.S. 5/40 fol. 16r.

<sup>167</sup> Robert Leslie, for example, in relation to a retour given for lord Lovat ‘allegit always that he denyit nocht the secund punct bot said the samin was nocht relevant’: C.S. 5/40 fol. 19v.

<sup>168</sup> C.S. 5/34 fol. 127v.

<sup>169</sup> C.S. 6/13 fol. 166v. A similar example occurs at C.S. 6/38 fols. 25v-26r.

Spittall objected to a summons addressed against his client and another person *in solidum* as cautioners, because the other cautioner was dead and Spittall's client, as the only surviving cautioner, should have been libelled 'in speciall' with the summons specifying precisely what he was required to pay.<sup>170</sup> Neither of these objections achieved its purpose nor, surprisingly, did Robert Galbraith's much more straightforward objection in another case to a summons raised by the earl of Rothes that it 'was generall & buir nothir zer moneth nor day'.<sup>171</sup> A slightly more sophisticated objection was made by Master John Lethame that a summons by Dutchmen against his French clients lacked specification (i.e. that the libel was general). The French had taken the Dutchmen's ship claiming it as a lawful prize; the Dutch responded by asserting that they had been sailing under a safe conduct of the great admiral of France and Brittany. Lethame responded with the argument that the summons was flawed because it failed to mention that the admiral had received authority from his king to grant such a safe conduct.<sup>172</sup> But in order to make such objections in the first place it was, of course, essential to have a copy of the summons.<sup>173</sup> In the event that the party who raised a summons failed to deliver a copy of it to the defender, the latter had the right to ask the lords to order delivery to be made.<sup>174</sup> The possibility of making technical objections to summonses made the drafting of the summons an important part of the legal process. Summonses were often referred to in the *acta* as 'kingis lettres' reflecting the fact that they were

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<sup>170</sup> C.S. 5/37 fol. 26v.

<sup>171</sup> C.S. 5/38 fol. 63r. Straightforward objections such as this were more common than the complex examples noted above. For instance John Lethame protested that a summons of spuilzie of lands raised by the countess of Cassilis failed to mention that she was in possession of those lands; Lethame did not fail to make the obvious point that she could not be spuilzied of that which she did not possess: C.S. 5/35 fol. 104v.

<sup>172</sup> C.S. 6/9 fols. 76r-v; 171r-v.

<sup>173</sup> C.S. 5/39 fol. 3r: Robert Leslie, on his client's behalf, required the pursuer to deliver a copy of the summons so that thereby his client might use his defences.

purchased under the signet.<sup>175</sup> The infinite variety of the summons, which made it the most popular means of initiating a legal action at this period, contrasted with the stereotyped nature of the brieve and may have given the man of law a significant role in giving initial advice on points of drafting to his client who would then seek to obtain a summons drafted by writers to the signet in conformity with this advice.<sup>176</sup> But summonses, although formulaic, were essentially flexible. They could certainly be amended during the hearing of the action and there are numerous references to parts of the summons being regarded as '*pro deleto*' by the pursuer: often defenders asked that it be noted that the pursuer no longer intended to pursue his claim against them but only against others named in the summons.<sup>177</sup> Any input which men of law may have had into the content of the summons was less direct than in the case of written defences in the drafting of which men of law had a more active role.<sup>178</sup> Moreover it was certainly the practice later in the century for the defences once drafted to be delivered by one man of law to another so that he might then draft his answers.<sup>179</sup>

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<sup>174</sup> C.S. 5/37 fol. 56r.

<sup>175</sup> Hector McKechnie, *Judicial process upon Brieves, 1219-1532*, (Glasgow, 1956), 23, 28-9.

<sup>176</sup> On writers to the signet during this period see Hannay, *College of Justice*, 301-2. The signet summonses in C.S. 15/1 are drafted by notaries such as Maben, Gude and Wallace. The statement that men of law gave initial advice is speculative. In *Sinclair's Practicks* there is reference to the procurator James McGill who is said to have 'faillit in the libelling of his summondis and in the conclusion thirof' (S.P. c. 123) although this does not necessarily mean that he helped draft the summons. Also, see the advice note (c. 1476) given in Fraser, *The Lennox*, ii, 106-9.

<sup>177</sup> For example C.S. 5/39 fol. 125v.

<sup>178</sup> C.S. 15/1 *Bonar of Rossy v Patrick, lord Crichton, Sheriff Principal of Perth and his Deputes* (1544). The defences in this case were subscribed by the man of law Master David Macgill. An extract '*ex libro actorum*' subscribed by Master James Scott in this process, bearing the marginal note 'for production of defensis', narrates that the lords continued the matter in dispute to allow the defender 'to geif in all his defenses quhilkis he hes or will uss relevantlie qualifiit in writt aganis the summondis'. This is a rare example of surviving defences from this period written, as with other documents in the process, on paper. As for the flexibility in framing the summons, see Murray, '*Sinclair's Practicks*', 98, quoting the *Practicks* as indicating that the order of the parts of the summons was not vital, allowing the conclusion to be placed before the beginning without invalidating the summons.

<sup>179</sup> For example, C.S. 7/31 fol. 87v: *Perth v. Dundee* (11 July 1564). In this case Master David Borthwick, having produced written defences, delivered them to Master Thomas McCalzeane, the

As well as legal argument the procurator could produce physical evidence backing his claims. This may have consisted of documentary evidence such as a sheriff court roll, protocol book or notarial instruments or even a decret in a similar case heard previously by the lords.<sup>180</sup> Written evidence and pleadings were very important. In one case a foreign litigant arrived with certain 'wrytingis' and protested, by his man of law, that he would not 'enter to pley the said mater' but desired only to have an answer to the writ he produced.<sup>181</sup> It appears to have been standard practice for the lords to receive 'exceptionis and informationis gevin in write befor thaim'.<sup>182</sup> Indeed in matters concerning heritage written evidence was essential or, at least, Robert Galbraith objected to witnesses being examined in relation to heritage because this was something that he alleged should 'be evidentlie previt and nocht be witnessis'.<sup>183</sup> It is equally clear, however, that there was also a great deal of oral debate before the lords. One late source indicates, in reference to exceptions, that they might be proponed by tongue, or given in by writ at the bar and so left 'in the lordis handis to be discussit'.<sup>184</sup> There are examples of actions in which written exceptions and other written evidence, as well as entire witness depositions, were read over in court by men of law at the command of the lords and in the presence of the opposing

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procurator for the burgh of Perth, who was then assigned a term by the lords on which to give in his answers. Whether such a procedure occurred in the 1520s is certainly possible although there are no cognate examples of it in the *acta* during that period. Instead there are references to parties handing in their 'lawis', for example, C.S. 5/36 fol. 35v. On the *Perth v Dundee* case, see also C.S. 1/2/1 fol. 85v: 11 December, 1563.

<sup>180</sup> For a decret in a similar case being used see C.S. 5/43 fol. 157v. For a rolment of court being produced see, for example, C.S. 6/1 fol. 9r.

<sup>181</sup> C.S. 5/36 fol. 45r.

<sup>182</sup> *Morton Registrum*, ii, 286.

<sup>183</sup> C.S. 5/37 fol. 79v; 'evidentlie' i.e. by 'evidentis'. This was by no means a new rule; see, for example, *A.D.C.*, i, 177.

<sup>184</sup> Laing MS III 388a, fol. 5r 'Anent the proponing of exceptions quhilk concerne the procuratouris'.



counsel.<sup>185</sup> In one case James Foulis acting as prelocutor for the defender protested that he should not be required to answer the second point of the summons until the first point had been discussed and held relevant.<sup>186</sup>

The best evidence was undoubtedly written and this caused its own difficulties. Thus an exception might be raised against a charter produced as evidence of the transfer of sasine objected to for being 'contrar the consuetude of burgh and stile of court'.<sup>187</sup> Cases might be continued while searches were made for old letters, instruments and other documents which might provide more clarity to a dispute especially when land was involved. In one case, Master Henry Lauder offered on behalf of the earl of Glencairn and his son William to prove that the land in question belonged to barony of Kilmaurs and 'sa has bene reput and haldin past memorie of man'.<sup>188</sup> His opponent, Master John Lethame forespeaker for William Hamilton, responded that Henry had produced no evidence other than an assignation of those lands made by the late lord Kilmaurs. The action was continued to allow both parties to seek out documentary evidence with which to back their respective claims.

It was possible to make a supplication to the lords in the hope of recovering evidence which was in the possession of another party.<sup>189</sup> But once written evidence was

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<sup>185</sup> For example, in a maritime case in March 1554 James McGill and David Borthwick repeated in court 'the haill deposiciounis of the witnessis producit be thair said clientis...with the clerkis bukis and charter parteis producit be thame...with ane missive writtin in franche': C.S. 1/1 fol. 13r; in a later case Borthwick read out all his exceptions which he offered to prove on his client's behalf which he then left in the lords' possession: C.S. 6/29 fol. 23r: 18 May 1556.

<sup>186</sup> C.S. 5/39 fol. 74r.

<sup>187</sup> C.S. 5/42 fol. 4r.

<sup>188</sup> C.S. 6/1 fols. 63v-64r.

<sup>189</sup> For example, Walter Drummond sought to recover a summons of error belonging to him which he claimed was in the keeping of John Stirling of Keir. The matter was referred to Stirling's oath and,

produced, in particular older instruments, then their authenticity might be called into question. In another case involving William, Master of Glencairn, he managed to establish that a charter which had been produced allegedly bearing his seal and his signature along with those of his father had not in fact been subscribed by him because he was not present when the charter was sealed.<sup>190</sup> More standard was the allegation of forgery. Robert Leslie offered to prove that a charter of tailzie was ‘fals & feynzeit & scrapit away eftir it was first written & writtin agane of the new’ and so should have no faith in prejudice to his client.<sup>191</sup> If necessary the lords could issue letters to a party by which he might require the clerk register to extract the authoritative copy of a deed so that it might be used to verify the authenticity of the copy in that party’s possession.<sup>192</sup>

Sometimes actions were raised in order to obtain possession of documentary evidence such as a charter or instrument of sasine which was known to exist. Thus Janet Balfour sought the delivery of an instrument of sasine of an annualrent in the lands of Caraldston in Forfar which had been given by her father to David Pitcairn, archdean of Brechin. The action is described as an *actio depositi*. Pitcairn, through his procurator Hugh Rigg, argued that he ought not to be ordered to return the instrument because there was no question of *dolus* or *culpa lata*: he had placed it, along with documents of his own, in ‘the place of Ferchir’ from where those

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following his admission that he possessed the document the lords ordered him to produce it: C.S. 5/37 fol. 116r.

<sup>190</sup> C.S. 6/2 fol. 11v

<sup>191</sup> C.S. 5/37 fol. 50v.; also C.S. 5/38 fol. 74r.

<sup>192</sup> C.S. 5/37 fol. 72v. The Exchequer Rolls might also be used; in a case involving the nonentry of the lands of Carlton, Thomas Marjoribankis produced a ‘draucht of the chekkir billis berand quhair the airis of carltoun was interit’: C.S. 6/1 fol. 21r.

‘writingis and evidentis war negligentlie tint efter the ressait thirof and befor the moving of the pley’. In other words, as depositee he had not been negligent and so should not be required to hand back possession of the now missing instrument to the representative of the depositor.<sup>193</sup> Shortly afterwards another example occurs, this time relating to a charter narrating a gift of nonentry made by James Beaton when archbishop of St Andrews to James Strang the pursuer. The charter had been in the possession of Strang’s man of law, Robert Leslie, until his recent death and was now in the possession of his heir Andrew who had allegedly refused to return it and had been intromitting with the lands to which it related. Strang required the document in order to prove, in a dispute with another party, that the lands in question belonged to him.<sup>194</sup> In actions of proving the tenor of a document that had been produced, at least on one occasion, custody of the document in question was given to Sir Alexander Scott, depute Clerk Register.<sup>195</sup> Scott was clearly in the habit of acting as custodian of written documents: in 1528 he declared that documents relating to the lordship of Dirleton had been in his care for nine years.<sup>196</sup>

Witnesses were summoned by letters issued by the lords. If the witnesses did not appear in answer to the summons then the lords would issue new letters under which they might be summoned ‘undir greter painys’<sup>197</sup> unless there was a reasonable

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<sup>193</sup> C.S. 6/13 fol. 172v.

<sup>194</sup> C.S. 6/13 fol. 219v.

<sup>195</sup> C.S. 5/37 fol. 54v. Scott (d. 14 May, 1544) was appointed one of the deputies of the Clerk Register in 1516 and enjoyed a long career in the king’s service: Murray, *Exchequer and Crown Revenue*, 25-6.

<sup>196</sup> C.S. 5/38 fol. 132r. The documents were to be delivered to the husbands of the three heiresses to the lands of Dirleton although one of those husbands, the master of Ruthven, would not compare to receive them.

<sup>197</sup> For example, C.S. 5/34 fols. 4v-6v. The procedure in some ways is similar to that before the Court of the Official, see Ollivant, *The Court of the Official*, 105-6.

excuse, such as absence on the king's service, in which circumstance the action would be continued without prejudice.<sup>198</sup> The witnesses would be produced by one party and a time would be assigned for their examination. The examination of the witnesses, who were under oath, would be made by a small committee of the lords at which neither the parties nor their procurators were allowed to be present.<sup>199</sup> Those lords, once they had examined the witnesses, sealed a document containing their depositions which could then only be opened on the command of a quorum of the lords.<sup>200</sup> In the event that the case was continued to a later session, as it often was, the depositions of the witnesses could not be opened for a considerable time and this might cause prejudice to the party seeking a remedy on the basis of them.<sup>201</sup> Either party might renounce further production of witnesses and, once the depositions were published, no new witness could validly be deposed and, in the event that further witnesses were to be called, or witnesses were to be summoned again, existing depositions had to remain closed.<sup>202</sup> The parties might each submit an interrogatory -

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<sup>198</sup> For example, Sir John Scott procurator for the earl of Morton stated that although he was ready to pursue his action his witness was in the Borders on the king's service with the earl of Angus and therefore the lords continued the action: C.S. 5/35 fol. 152v.

<sup>199</sup> Three lords were chosen in September 1523 for this purpose: the abbot of Dundrennan, the justice clerk and Adam Otterburn (C.S. 5/34 fol. 4v). Only two were assigned to examine witnesses in a case heard in November 1527: the official of Lothian and Master James Lawson (C.S. 5/38 fol. 34v). In 1532 the procedure seems to have been regularised when it was laid down that a committee of three was to be chosen weekly to hear witnesses. They were to convene in the afternoons as required. Of the three one was to be temporal and two spiritual and then the following week two were to be spiritual and one temporal and so on: *A.D.C.P.*, 375-6. However it is questionable whether this was rigidly adhered to. The evidence from C.S. 15/1 (see below) indicates that only one or two lords might be present to examine witnesses e.g. *Angus v Seton* (1539) begins 'Examinators dominus Ruthven M John Letham'; and in *Scott v Seton* (1539) two diets of examination were held, on 3 and 23 July 1539, each held by one examiner.

<sup>200</sup> C.S. 5/35 fol. 128r.

<sup>201</sup> C.S. 5/35 fol. 170v

<sup>202</sup> For an example of a renunciation of further witnesses see C.S. 5/38 fol. 109r. In one case (C.S. 5/38 fol. 83v) Galbraith protested that the bishop of Galloway should not be received as a witness against Lady Lochleven because prior to his examination the depositions of the other witnesses had been published rendering his deposition invalid 'sen be the lawis and pretick *post publicacionem productionis non licet testes de novo producere*'. However, exceptions against witnesses might be proposed following their examination but prior to publication of their depositions: C.S. 5/36 fol. 58v.

a list of questions - based upon the points raised in the summons and this would form part of the lords' examination.<sup>203</sup> In one case the lords apparently proceeded to examine witnesses whilst the defender was absent on the king's service. On hearing of this the defender, John Hay, Lord of Yester, asked the lords to recall the witnesses that he might propone exceptions against them and also that they might be examined upon his interrogatory because he had been informed that they had been suborned by the pursuer.<sup>204</sup>

In the case of *William Scott v Andrew Seton* (1539) the interrogatory given in by Seton survives.<sup>205</sup> The case involved an allegation that Scott had been wrongfully ejected from his lands. Seton requested that the lords ask witnesses whether they 'gif thai war present hard & saw ony sic eiection as is libellit And quhat zere moneth & oulk the said pretendit eiection was done'. Secondly, in relation to part of the summons which alleged that Andrew had laid waste to the lands in question, the lords were to examine diligently the witnesses to discover 'be quhat force & maner the said andro laid the saidis landis waist & quhat baisting & manising (menacing) he maid to the said william & his servandis'.<sup>206</sup> The interrogatory ends with the phrase '*reliqua interrogatoria referuntur prudencio domini examinantis*'. In order to 'found his defensis' a party could obtain a copy of the summons against him and it

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An example of depositions ordered to remain closed while witnesses were summoned 'undir gretar panys' occurred in 1526: C.S. 5/36 fols. 92r-v: 29 August, 1526.

<sup>203</sup> C.S. 5/38 fol. 150v.

<sup>204</sup> C.S. 5/39 fol. 133r.

<sup>205</sup> This interrogatory omits mention of the first point that appears in some other extant interrogatories, namely a reminder to the judges to show to 'everilk ane of the saidis witness the payne of ony persoun berand fals witnessing in ony caus...'. This is found, for example, in C.S. 15/1 *Scott of Buccleuch v Scott of Howpasley*.

<sup>206</sup> C.S. 15/1 *Scott v Seytoun* (1539).

would have been on the basis of the points raised in that summons that the interrogatory would have been framed.<sup>207</sup>

The earliest extant process in which the depositions have been preserved dates from January 1539, a case of spuilzie brought by Thomas Angus against Ninian Seton.<sup>208</sup>

The alleged spuilzie had occurred over a decade earlier but the witnesses, once sworn, deponed as to their whereabouts at that time and as to what they remembered of the events in dispute.<sup>209</sup> Thus Adam Broun gave a description of the goods taken

and an estimate of their value; the summary of his deposition ends with the phrase 'And this he kennis becaus he saw the gudis ga by he beand present in the toun'.<sup>210</sup>

John Bas, although not himself present, spoke to the fact that 'the commoun voce was that sic gudis was spulzeit be sir niniane setoun fra the libellar'. Other witnesses produced what nowadays would be described as hearsay evidence deponing as to the state of common knowledge (*ex commune voce et fama* or 'the voce of the cuntre') and indicating what they had heard from others. The witnesses varied as to their recollections and the details which they could give. Robert Anderson indicated that sixteen milk cows, three 'tydy' (pregnant) cows and fourteen young 'nolts' had been spuilzied but Thomas Donaldson deponed that 'he saw certane ky ga by the nomer he kennis nocht'; in contrast William Bennet stated that about eleven years ago he 'saw

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<sup>207</sup> C.S. 5/35 fol. 139r: protest that the defender 'mycht haif the copy of the said Williamis summondis that thirby he may found his defensis aganis the samin failzeing thirof that he suld nocht be haldin to ansuer to the samin'.

<sup>208</sup> C.S. 15/1. This source consists of a box of extracted and unextracted processes dating from 1527 to 1549. These documents can only be identified according to the name of the case from which they emanate.

<sup>209</sup> One witness, Rob Rowend, deponed that he was 'in his awn hous' when he saw 'certan gudis cum by quhilk tha said wes tane fra thomas angus'. Some witnesses stated that ten years had passed since these events, others that ten or elevan years had elapsed.

<sup>210</sup> C.S. 15/1 *Thomas Angus v. Ninian Seytoun*. At the end of another deposition, by the witness Robert Anderson, it is stated: 'And this he kennis becaus he was present hard & saw'.

ane poynd gang by castell campbell tane be the lard of cowntis servandis' placing an altogether different gloss on events. All the witnesses appear to have been asked how much the goods taken were worth. Answers varied from those who gave precise figures per head of cattle taken to those who stated that they did not know. The question of value was clearly important and it is likely that the lords carrying out the examination were following an interrogatory framed by one of the parties in which witnesses were asked to estimate the value of the goods they saw. In the circumstances it would not seem unreasonable to ask for a valuation of the value of livestock from those who worked the land. But not everyone was qualified to comment. In the case of *Scott v Seton* mentioned earlier one witness, asked to speak to the yearly profit one might expect to draw from a ewe and some lambs which had been driven off Scott's land, responded that 'he kennis nathing becaus he is bot ane millar & kennis nocht the proffit of na gudis & can nocht estym the samyn'.<sup>211</sup>

No more than three diets of examination of witnesses were permitted and any witness thereafter produced would not be admitted.<sup>212</sup> When witnesses were called there were rules concerning the precise matters on which they might be questioned. An example of this occurred in a case between William, Master of Glencairn and Hector Bruce.<sup>213</sup> Hector raised a summons against William to rescind a charter made by the deceased Henry Bruce to William's father. William protested that he had been called to appear only to hear an action involving the rescission of a charter granted

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<sup>211</sup> C.S. 15/1 *William Scott v Andro Seytoun* (1539). In contrast the concept of the expert witness appears to have been known, at least in one case, in the church courts shortly after this date: Ollivant, *Official*, 105. There is no evidence of the use of expert witnesses in the secular courts but only very few depositions have survived.

<sup>212</sup> E.g. C.S. 5/38 fol. 109r.

<sup>213</sup> C.S. 5/34 fol. 93r



by his father to the late Henry. Thus his prelocutor argued that any witnesses produced by Hector should only be examined concerning the points of the summons relating to this matter and not relating to anything else in the summons: no regard should be given, he argued, to any depositions made relating to other points in the summons. Witnesses gave their evidence on oath and generally they were asked to speak to things within their own experience. For example, Master Thomas Bellenden, Director of the chancery, appeared and deponed that Isobel Hopper had renounced her conjunct-infeftment in relation to the lands of Blackbarony and that, 'as he rememberis' the renunciation reserved to her the liferent of the lands.<sup>214</sup> Memory played an important part not only in questions of land-holding but also in relation to matters such as proving a person's age which was an issue of importance in relation to questions of wardship or tutory.<sup>215</sup> Moreover, witnesses might be summoned to 'impreuve' (disprove) a deed, typically an instrument of sasine. In one case a number of witnesses called to disprove the authenticity of such an instrument were objected to because their names did not appear in the instrument. This objection was repelled by the lords because the witnesses in question

'war for the maist notaris and know the notar that maid the instrument  
And thai wald examine thaim gif the instrument was the notaris hand writ  
or nocht'.<sup>216</sup>

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<sup>214</sup> C.S. 5/40 fol. 22r

<sup>215</sup> This occurred in an action between David, Abbot of Arbroath and Margaret Forbes in relation to the wardship and marriage of Alexander Bannerman, Margaret's son. Robert Leslie, for the abbot, offered to prove that Alexander was over the age of seven (and should therefore be in the abbot's custody) whereas Thomas Marjoribankis for Margaret offered to prove he was under seven: C.S. 6/1 fol. 72v. Similarly age was important in determining whether or not a tutory was still effective; thus it was established 'upoun the deposicounis of famous witnessis' that Alexander, lord Elphinstone, was 'past xiiii zeris of age and out of tutorie': C.S. 5/35 fol. 190r.

<sup>216</sup> C.S. 6/1 fol. 51v. There was precedent for a notary being cited as a witness because the lords considered that points made in an instrument he had drawn up were obscure: *A.D.C.*, i, 189: 22 March, 1491.

When witnesses were called they could claim their reasonable expenses for appearing in Edinburgh from the party who had summoned them. The Aberdeen burgess John Rattray, summoned by Robert Lumsden to give evidence against Gilbert Menzies, complained that although his expenses of two shillings per day had been 'taxt' by the lords, John was dilatory in paying him and he sought an order that he should continue to receive this sum daily for as long as John defaulted.<sup>217</sup>

A fairly common procedure was the reference by one party to the oath of the other. When James Kennedy of Blairquhan asserted that he had in fact paid maills for the non-payment of which he had been poinded by Lady Janet Stewart, Robert Leslie for Janet referred the matter to his oath. James was assigned a day to depone and give his oath that he had paid the sums owed; he was instructed in the meantime to 'aviss apoun his deposicioun' presumably with his own man of law and eventually he appears to have submitted a written deposition.<sup>218</sup>

Witnesses could be objected to not only on the basis that the accuracy of their testimony was suspect but also where there was a suspicion of partiality based on, for instance, affinity or consanguinity.<sup>219</sup> A good example of this occurred in 1543 when Thomas McCalzeane, for Robert Douglas of Lochleven, protested against two witnesses introduced by his opponent the earl of Morton. The first, John Tenent, he

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<sup>217</sup> C.S. 5/41 fol. 158r.

<sup>218</sup> C.S. 5/38 fol. 51v, 87v. James appeared personally. This action took the form of an action of spuilzie in relation to oxen and cows belonging to James which Janet and her accomplices had seized. Janet responded by producing royal letters and a decret of the lords giving her authority to exercise diligence by poinding. Once James gave his oath, Robert Leslie as Janet's forespeaker immediately and without question confessed the spuilzie.

<sup>219</sup> For instance in February, 1524 the Master of Ruthven protested against Mr. Lawrence Oliphant and his brother 'because the saidis persounis war within greis of consanguinitie and affinite to his wif and suld nocht be admittit be the law to beir witnes': C.S. 5/34 fol. 107v.

objected to on ground of affinity averring that he was married to a woman within the fourth degree to the earl and the second witness, the laird of Sheriffhall, was 'thrid and ferd in consanguinite' to the earl. The earl denied the first averment on oath and then asserted that Sheriffhall was of the fifth degree in consanguinity to him and had been purged of partial counsel therefore making him a competent witness.<sup>220</sup> In one action of spuilzie, in which a box containing nineteen thousand merks was allegedly taken from the Perth lodging of George, Earl of Rothes, witnesses who had appeared on the earl's behalf were objected to because they had not been summoned by a macer but had been 'solistit' to come to the Edinburgh by Patrick Charters at the earl's request.<sup>221</sup> Patrick, it was said, had bribed the witnesses who were described as 'pure simple vile persounis that suld nocht be admittit previs in sa grete a mater & actioun'. To underline this point specific allegations including adultery, murder, fire raising and theft were made against some of these witnesses.

The exceptions raised by Andrew Seton against witnesses summoned by William Scott make equally interesting reading. Five men, 'reput and halden honest', are firstly named with no objection. Then David Raven was objected to because William Scott was married to his 'kinniswoman' and so 'willame is allyt with the said david'.<sup>222</sup> William's cook, who lived on his land, was objected to as a witness. Two men, described as 'pure deablis (devils)' and 'vagabondis' were objected to because they lived on Scott's land in Montrose and allegedly had no possessions other than

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<sup>220</sup> *Morton Registrum*, ii, 286. The lands of Sheriffhall were held by the Gifford family. Balfour states that anyone within the fourth degree of consanguinity or affinity may be repelled as a witness, quoting a case from 1541 as authority for this: *B.P.*, ii, 377.

<sup>221</sup> C.S. 5/38 fols. 63r, 75r, 75v. Patrick Charters had allegedly usurped the office of provost on an annual basis without allowing free elections: C.S. 5/38 fol. 189v.

<sup>222</sup> William was married to Andrew Raven's daughter who was David's neice.

those furnished by Scott in return for their testimony.<sup>223</sup> Finally, William Linton was excepted against because he had appeared as Scott's witness in a previous case concerning the spuilzie of some sheep and had given false evidence.<sup>224</sup>

Although normally witnesses had to go to the lords, in rare cases of particular difficulty, the lords might go to the witnesses. Thus in one case the king's advocate, the dean of Restalrig and the parson of Spott were sent to the Tolbooth of the burgh of Dundee as assessors to summon an inquest of those in the best position to know the truth of the facts in issue.<sup>225</sup> This procedure, reminiscent of the *enquête* procedure in contemporary France, arose because 'the witnessis producit be aither of the saidis partyis hes provit direct contrar utheris'. Particular difficulty seems to have been caused where witnesses or men of law were in direct contradiction to each other; so much so that according to Sinclair's *Practicks* one party could not produce an exception, article or reply directly contrary to the summons or an exception of the other party.<sup>226</sup> On other occasions notaries might be sent to receive depositions from witnesses unable to attend. In one case Robert Galbraith alleged that three men, who had been summoned to give evidence, were 'waik aigit & febill persounis at mycht nocht travale' and the lords granted his request that 'ane notar of the court or uther famous notar' visit them and take their evidence, closing the despositions and returning them to the lords.<sup>227</sup> In such a case it was competent for the other party to

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<sup>223</sup> The suggestion was implicit that these men had been bribed (or 'seducit') to perjure themselves.

<sup>224</sup> C.S. 15/1 *William Scott v Andro Seytoun* (1539). Some of these men appear to have given evidence on 23 July 1539. The note of the exceptions is undated. For good measure, it concludes with the allegation that Scott 'hes causit all the honest men pas away that kennit the verite best'.

<sup>225</sup> C.S. 6/13 fol. 163v

<sup>226</sup> *Sinclair's Practicks*, nos. 113 and 126: E.U.L. Laing MS III-388a fols. 49r, 50v.

<sup>227</sup> C.S. 5/31 fols. 37r-v: 22 June, 1518.

appear before the notary and raise lawful exceptions against the witnesses.<sup>228</sup> In cases involving a foreign element, depositions could be obtained from abroad. In one case John Moffat, Scots Conservator in Flanders, alleged that he had already paid a debt owing to Thomas Niddry, Abbot of Culross, which the abbot's executor was seeking to recover. A commission was sent to the bailies of Veere who returned depositions of witnesses, together with copies of a letter from the abbot in which he appointed procurators to receive the money and their receipt indicating that they had done so.<sup>229</sup>

Procurators, as well as leading evidence, would often have been in possession of that evidence during the dependence of the action.<sup>230</sup> It was normally up to the client to provide the evidence that would form the basis of the legal argument in the case. Thus when Gilbert McDowall came to Edinburgh in the winter of 1526 to defend himself in actions raised against him he brought with him the relevant instruments, precepts and writs with which he planned to do so.<sup>231</sup> This evidence would then have been handed over to the man of law who would use it to prepare his case.<sup>232</sup> In one action which the lords continued Walter Lundy, the defender, was instructed to

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<sup>228</sup> E.g., C.S. 5/30 fol. 114v: 27 July, 1517: reference to a commission to the notary Robert Josse, to hear on a specified certain infirm witnesses in Brechin, allowing the opposing party or his procurator to attend and raise exceptions.

<sup>229</sup> C.S. 6/2 fol. 125r: 19 March, 1533.

<sup>230</sup> One woman even called Master Adam Otterburn before the lords to deliver to her 'certane evidētis' which she alleged belonged to her; presumably she was a former client or Otterburn had acted against her on behalf of someone else: C.S. 5/43 fol. 92v.

<sup>231</sup> C.S. 5/36 fol. 133r. This case was mentioned *supra*. McDowall clearly did not bring all his writs with him, merely those relevant to the actions he was involved in. The case re-appears in the record at C.S. 5/37 fol. 72r.

<sup>232</sup> In 1527 James McGill's spouse, in his name, placed on the lord's 'burd' (i.e. table) a box with documents belonging to the laird of Galston who had the key to the box in his possession. Sir Alexander Scott, depute clerk register, immediately delivered the box to the laird and may personally have recorded this fact at the end of this entry in the *acta*: C.S. 5/38 fol. 35v.

appear personally on a specific day to answer the matter or else to 'send his procuratour with his informacioun'.<sup>233</sup> Not everyone kept their legally significant documents and contracts with them. For more security the more prominent members of society might place their documents in a stronghold or ecclesiastical centre for safe keeping.<sup>234</sup> For example, in his minority Alexander, Lord Elphinstone, sought recovery from his erstwhile tutor, Robert Elphinstone, Parson of Kincardine, of writs and contracts pertaining to him which were in Robert's control. Most of these were kept in the priory of the Black Friars in Stirling and Robert was ordered by the lords of session to hand control of them over to Alexander and his curators together with any relevant deeds not in Stirling which Robert also had in his possession. Once these were handed over, and Robert was given a receipt, the documents were placed in a chest and returned to the priory for safe keeping. For extra security three locks were apparently placed on the chest and Alexander, the prior and Henry Spittall 'advocat for the said lord', each received a key. This was an arrangement which was to last four years until Alexander reached his majority and was designed to allow Alexander and his man of law to have access to the deeds 'for the defence of his pleyis at altyme quhen neid beis'.<sup>235</sup> Not everyone was so security conscious.<sup>236</sup> In a case brought by George, Lord Home against Helen Shaw, Lady Dirleton, Helen's

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<sup>233</sup> C.S. 5/37 fol. 50r.

<sup>234</sup> As will be seen shortly, the earl of Huntly kept his significant charters and documents in his main strength the castle of Strathbogie.

<sup>235</sup> C.S. 5/36 fol. 145r. This information comes from a deed registered before the lords and preserved in the *acta*. The reference is to 'thre lokis put apoun the kist' which does suggest that three separate keys would be required to unlock it, rather than three keys each capable of opening the same lock.

<sup>236</sup> Although it is interesting to note that the charter chest of the earl of Lennox was also kept with the Black Friars although this time in Glasgow. It was broken into after his death in 1526 by his mother and his son's tutor, Allan Stewart, in the absence of his widow who held the key. A new lock was placed on the chest and Lennox's widow was denied entry: C.S. 5/38 fol. 144r. It is also interesting that one of the advocate John Shairp's clients, rather than giving his last testament to Shairp to keep for him, put it in a writing desk, locked the desk, and then gave Shairp the key: *Correspondence of Sir Patrick Waus of Barnbarroch, knight*, (ed.) R.V. Angew, (Edinburgh, 1887), II, 385.

man of law produced a charter of her lands of Haliburton together with a precept of sasine but the vital instrument of sasine was missing. It was said that it must have been destroyed or lost by reckless keeping and this loss undoubtedly weakened her case.<sup>237</sup>

### Procedural delays

The failure of a man of law to arrive, and to bring with him this evidence, was a serious matter for his client. Normally, the lords would grant a delay. In one case the allegation that the defenders had no procurator caused an action to be continued with the result that, according to the *acta*, it ‘hes slept this lang tyme bipast’.<sup>238</sup> But this was open to abuse and the delay could not go on indefinitely. Thus the sheriff of Fife complained that no process should be given against him because he had given his defences to Thomas Scott his procurator who had gone to Berwick as one of the king’s commissioners.<sup>239</sup> Similarly George Gray argued that because Thomas Marjoribankis his procurator ‘was now lyand seik & had his evidentis and writtingis’ an action against him should be delayed ‘quhill he mycht be avisit with his procuratour’.<sup>240</sup> The lords did not allow him a delay because he had used the same argument before and the onus was on him in the interim to instruct another

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<sup>237</sup> C.S. 5/38 fol. 64r. That her case was weakened can be seen from the fact that her procurator sought to rely also on positive prescription whilst her adversary’s man of law sought an instrument narrating that her instrument of sasine ‘coud nocht be gottin’.

<sup>238</sup> C.S. 6/13 fol. 127r. The notion of actions going to sleep, only to be awakened some years later, was not unusual in an era when actions could outlive lawyers. In one case Robert Galbraith alleged that six or seven years had passed since the lords had set a date for the disproving of an assignation and that, nothing having happened in that time, his client should be freshly summoned to answer in the matter: C.S. 5/37 fol. 68r.

<sup>239</sup> C.S. 5/39 fol. 31r. Presumably Scott was given the note containing the defences in order to advise upon and amend them if necessary.

<sup>240</sup> C.S. 6/6 fol. 159v



procurator. However, it was possible to avoid such a result by obtaining a letter from the king instructing the lords to continue the calling of a summons thus giving a client the opportunity 'in the meyntyme [to] pas hame & feche his evidentis & just defensis'.<sup>241</sup>

Similarly, delay might be granted so that a procurator might seek instructions from his client. In July 1525, for example, James Gordon of Westpark was placed in possession of the castle of Strathbogie by the third earl of Huntly on his death-bed. Gordon was to hold the castle, which contained Huntly's deeds and charters, for the benefit of his nephew, the new earl, during his minority. The countess of Huntly, however, obtained letters demanding that the castle be handed over to her within twenty-four hours unless reasonable cause was shown why they should not be. As a result James was put to the horn. Later, appearing by George, fourth Earl of Huntly, a supplication was presented on his behalf against the countess. The lords suspended the horning against James for a period of twenty days in the hope of an amicable settlement. The countess' procurator, Robert Galbraith, asked for a copy of the supplication that he 'mycht send the samyn to the countes to haif hir aviss in the samyn'.<sup>242</sup>

It was difficult for a procurator to argue that because his client had to be somewhere else that therefore an action against him should be delayed. Such an argument did not find favour when Robert Leslie tried it on behalf of David Beaton, Abbot of

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<sup>241</sup> C.S. 5/36 fol. 148r.

<sup>242</sup> C.S. 5/35 fol. 115r. The horning was suspended for twenty days 'that gud wais may be had in the said mater'. On 30 August Elizabeth's letters were suspended by the lords because they were 'inordourlie procedit': C.S. 5/35 fol. 131v.

Arbroath, who was said to be 'at the erding (burial) of his fader'. The abbot's tenants in Arbroath, acting against him, were allowed to proceed.<sup>243</sup> The opposite situation also raised difficulties. When James Ogilvy of Balfour sent instructions to Master Robert Galbraith to make a plea for him, Galbraith 'than happynit to be furth of the toun' and in his absence James' opponent managed to secure decree *simpliciter* against him.<sup>244</sup>

Litigation could thus take considerable time and in the end could be very costly. Of course delay was tactically desirable where it led to the prospect of financial gain. Walter Gourlay, in a letter to the lords, complained that whereas his summons of error had been called every Wednesday since the beginning of the session it had been continued from day to day by the activities of the treasurer and the king's advocate 'for the kingis proffit'.<sup>245</sup> This suggests that the king was drawing the fruits of lands which Walter believed were his and that tactical legal delays were being used to maintain this situation. The rather sad example of Robert Arnot is equally illustrative. In the furtherance of a dispute with David, Earl of Crawford, Arnot came with his servant 'foure sessioun tymes in the zeir to the burgh of Edinburgh and awaittand therein every time upoun the calling of the said mater xij dayis he his man and thir horsis expensis every day estimat to viij s & for maisaris feis iij s'.<sup>246</sup> These were the least of his expenses in an action that had he had been pursuing for thirteen years.

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<sup>243</sup> C.S. 6/2 fol. 9r; see also fol. 7v where the lords refused to accept 'the excusation maid be robert lesly procuratour for the said abbot that he was at the funerale supulcur of his fader & mycht nocht compeir & thirfor the lords mycht not proceid be the law in the said mater'.

<sup>244</sup> C.S. 6/2 fol. 15v.

<sup>245</sup> C.S. 5/35 fol. 135r

<sup>246</sup> C.S. 6/13 fol. 130r.

But speed could also be tactically desirable especially for the pursuer. The dean of Glasgow, having had two of his horses pointed by John Moutrie of Markinche and his son for non-payment of a debt, sought to have the horses restored by purchasing letters on a Thursday charging John to appear before noon the following day in the Tolbooth of Edinburgh. John appeared before noon having crossed to Edinburgh as soon as he could get passage on the ferry, only to find that that he had already been put to the horn because the dean had that morning purchased yet more letters.<sup>247</sup> Immediately warded, John sought his release complaining that the procedure used by the dean was not only against the 'commone stile and practick of the court' but had never been 'practickit nor usit' before. Similarly when Master John Spens of Mareston obtained letters discharging unlaws of the sheriff court of Fife the sheriff summoned him at his home on Monday to compeir before the lords the following day. Spens, in St Andrews when he heard that the sheriff had had his summons executed, immediately rushed to Edinburgh to be heard but was too late: the sheriff had already had Spens' letters suspended and his goods pointed to the value of the debt.<sup>248</sup> Deliberately failing to give a copy of the summons to the defender, however, was not an effective way to victory for a pursuer. The defender might simply ask the lords to order the party who raised the summons to deliver a copy of it to him. This

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<sup>247</sup> C.S. 5/33 fols. 138v, 140r+v, 146r, 181v, 182r, 188v. (January/February, 1523). The dean had alleged that John had sworn before the lords 'be goddis boddy that the said dene suld nevir gett thai horsis restorit' and that they should take his home 'doun about his luggis' before he would give them up.

<sup>248</sup> C.S. 5/36 fol. 114v

in turn would engender a delay with the lords granting a period for the defender to seek advice on what exceptions, if any, might be raised against the summons.<sup>249</sup>

The ultimate means of delay was to keep an action alive until there was a general continuation of actions to a later date. The practice of continuing actions until a fresh diet was frequent but was not all-encompassing. Actions involving the king or strangers were always excepted in proclamations authorising continuations and sometimes specific actions involving named parties were also excepted. However, when an action was not specifically excepted in this way, any attempt to hear it prior to the date to which it had been continued was subject to protests for nullity of process.<sup>250</sup>

In conclusion, from beginning to end of the legal process it was increasingly important, especially for those unfamiliar with the courts, to obtain the services of a man of law. The vast majority of procedural points raised before the lords were made by a small number of men of law and it is clear that opportunities existed for them to delay the final resolution of cases significantly if it was in the interests of their clients to do so. Often this led to cases being ended by arbitrated settlement rather than by final decret of the lords. There can be little doubt that formal legal proceedings were sometimes raised by a party in order to encourage his adversary to negotiate. Indeed in some circumstances negotiation might be the more socially acceptable solution. According to his prelocutor Henry Lauder, Alexander Dunbar of

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<sup>249</sup> C.S. 5/37 fol. 56r. In this particular case, *Thomas Kerr v John Cranston*, Kerr was granted a period of 21 days 'to be avisit'.

<sup>250</sup> C.S. 5/37 fol. 198r.

Cumnock was willing to submit himself to any three of the lords of session 'amicably' because he was loathe to stand against his superior if he could do otherwise.<sup>251</sup>

The influence of Romano-canonical procedure in the session is clear. The number of written documents in use, which in the way they were enclosed together physically resemble modern court processes; the citation and secret examination of witnesses who were speaking to facts rather than acting as compurgators and doing so before only one or two judges; the use of documentary evidence and the terminology of the libel, exception, probation and *litiscontestatio* are major features, as is the frequent use of arbitration. Equally, however, the lords created rules particular to the procedure used before them and in this way the 'practick' of the session was constantly evolving.<sup>252</sup>

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<sup>251</sup> C.S. 6/11 fol. 156r.

<sup>252</sup> Although Balfour cited cases from the reign of James V which still stood as authority for contemporary practice in the 1570s, it was only to be expected that there were also areas of procedure in which significant change had occurred. An example is the general rule stated by Balfour that neither priests nor women could act as procurators, (*B.P.*, ii, 298-9), a rule which clearly did not apply in James V's reign.

## Chapter Six

### Comparing Counsel: Robert Leslie and Robert Galbraith

It is now necessary to move from the general to the particular by examining in greater detail the careers of specific advocates during the reign of James V. The two men selected for particular attention are Robert Leslie and Robert Galbraith, a choice informed by several considerations. First, they represent a contrast: Leslie was a secular man of law who never became a lord of session, Galbraith was a churchman who did. Secondly, and more importantly, the practising careers of both were virtually contemporary. Thirdly, neither man, unlike for example Thomas Marjoribankis or Henry Lauder, enjoyed a legal or administrative career lasting significantly beyond the reign of James V; most of what is known about them is known only because of their legal activities. Finally, it must be remembered that there was no strict *cursus honorum* and, although there are similarities in the backgrounds of men of law during this period, no single career can be considered paradigmatic. By looking at two careers in parallel a slightly more representative picture may emerge.

#### Part One: The career of Master Robert Leslie

Of the personal history of Robert Leslie only the barest facts are known. If it is correct to identify him with a student from Angus of the same name who matriculated at St Andrews in 1508 or 1509, then this would place his date of birth some time in the mid-1490s.<sup>1</sup> According to Grant, he was the son of Master Walter Leslie, parson of

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<sup>1</sup> Anderson, *Recs. of St Andrews*, 202. Of all the general procurators named in 1532 Leslie's graduate status is the least certain. He was not consistently described as 'Master', even by the clerks of the council. This might indicate that it was, in his case, merely a courtesy title. There is no evidence that he

Menmuir.<sup>2</sup> Walter was commissary of Dunkeld from about 1517 and he must have been a skilled canonist because at that time the diocese contained a considerable number of trained canon lawyers.<sup>3</sup> Described by Alexander Milne, in his *Vitae Episcoporum Dunkeldensium*, as a person of noble birth on both sides, Walter was probably the illegitimate son of one of the Leslie of Rothes.<sup>4</sup> There is no indication of who Robert's mother was nor is much known about his siblings. He certainly had a sister named Euphemia and, although he appeared together with a chaplain named James Leslie in a document dated 1525, there was no indication that they were related.<sup>5</sup> In the following year, in the sheriff court of Fife, Robert acted for Margaret Leslie, described as a tenant of Glasmont, who was probably a relative since she still lived there in 1530 when Robert purchased the barony.<sup>6</sup>

By 1527, and probably much earlier, he had married Christine Wardlaw by whom he was to have six children.<sup>7</sup> Christine may have been part of the family of Wardlaw of Torrie in Fife. Leslie certainly had links with this family in his professional career; he acted for William Wardlaw, brother of the laird of Torrie, and for Hector Bruce of Coultmalindie who was married to Gelis Wardlaw, probably another member of the family.<sup>8</sup> The difficulty in identifying Christine with this family is that it is unhelpful

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was a determinant at St Andrews, let alone that he graduated. However if he did indeed matriculate in 1508/9, he would have been a contemporary of David Beaton.

<sup>2</sup> Grant, *Faculty of Advocates*, 123.

<sup>3</sup> Watt, *Fasti*, 125; I.B. Cowan and M.J. Yellowlees, 'The Cathedral Clergy of Dunkeld', in (eds.), A.A. MacDonald, M. Lynch and I.B. Cowan, *The Renaissance in Scotland*, (Leiden, 1994), 141-2.

<sup>4</sup> *Dunkeld Rentale*, 326.

<sup>5</sup> NRA(S) no. 925, (Erroll Charters), no. 341: 24 April, 1525.

<sup>6</sup> *Fife Sheriff Ct. Bk.*, 46; *R.M.S.*, iii, no. 968: 7 October, 1530.

<sup>7</sup> See family tree in Appendix 13(b).

<sup>8</sup> Leslie also acted for William Scott of Montrose against John Wardlaw, laird of Torrie, in 1527: C.S. 5/38 fol. 54v: 10 December, 1527. Wardlaw was personally present and no forespeaker for him was named although he later used William Johnstone as his procurator: C.S. 6/2 fol. 112v. For Gelis as wife of Hector: C.S. 5/32 fol. 2r.



in explaining how Leslie became a burghess of Edinburgh. Had he married another woman of the same name who was one of the sisters of the Edinburgh burghess Thomas Wardlaw, this would have been readily explicable. But this Christine, and her sister Elizabeth, were represented by Robert Galbraith acting as their curator *ad litem* in 1522.<sup>9</sup> Given the age of his children (two of his sons were graduates by December, 1540), it is likely that Leslie was already long married by this date.<sup>10</sup> Nor does the Edinburgh Burgess Roll specify that Leslie became a burghess by right of his wife.<sup>11</sup> But of the fact that he was a burghess there can be no doubt; he is specifically described as such in several contemporary instruments as well as in the roll of burghesses.<sup>12</sup>

There is no evidence that Leslie engaged in trade. His only recorded activity within the burgh was orientated towards the law, witnessing and receiving sasine and acting before the lords in the Tolbooth. But this does not serve to explain why he agreed to defend the port of Leith in 1522 against Edinburgh at the climax of what Knox later called the 'auld hatrent'. The particular argument in that year concerned the profits of prize ships and who should receive them, but it was part of an older and wider dispute concerning the burghal privileges of Edinburgh and what was viewed as increasing encroachment upon them by the men of Leith.<sup>13</sup> The men of the port were led by Robert Barton of Over Barnton, Leith's leading sea captain who had risen to the rank of royal comptroller. Given the unpopularity of the cause of Leith in Edinburgh, Barton's claim to have experienced difficulty in obtaining an advocate to act for him

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<sup>9</sup> C.S. 5/33 fol. 14v: 15 November, 1522.

<sup>10</sup> *A.P.S.*, ii, 366. His eldest son, Andrew, was a graduate by May 1537: (S.R.O.) NP1/5A fol. 6v: 11 May, 1537.

<sup>11</sup> *Edin. Burgess Roll*, 307: 26 March, 1518.

<sup>12</sup> *Prot. Bk. Foular*, ii, no. 522: 29 November, 1524; *Prot. Bk. Foular*, iii, no. 310: 27 April, 1531.

<sup>13</sup> J.C. Irons, *Leith and Its Antiquities*, (Edinburgh, 1897), chapter XIII, 149ff, and appendices 29-31.

must be accepted.<sup>14</sup> But it is more difficult to accept that in January, 1523, Leslie voluntarily agreed to resolve Barton's difficulty by acting on Leith's behalf merely because the lords directed him to do so. As a burghess, sworn to defend the freedoms of Edinburgh, he could surely have ignored the direction with impunity especially since he would run the risk of alienating opinion in Edinburgh. It is hard to believe, even with Leslie's background in the north east, that as a burghess of Edinburgh he would have been considered neutral by the men of Leith. Nor did he have many clients in the port. The only other examples of him acting for Leith litigants occurred in 1530 and 1531.<sup>15</sup> On the other hand, his practice amongst Edinburgh burghesses was not large, including only two burghesses and the widow of another. However one of the burghesses was Adam Hopper, who was the dean of guild, and it is probably the case that little long term damage was done. The Leith episode is unusual, and should perhaps be explained on the basis that Leslie was placed under more pressure to act than the scarce detail of the record reveals.

As well as being a burghess of Edinburgh, Leslie had close links with the Cistercian convent at Elcho, in the parish of Rhynd on the south bank of the Tay, where his sister, Euphemia, was one of a community of about twelve nuns.<sup>16</sup> This led to another curious episode. In the mid-1520s Elizabeth Swinton, Prioress of Elcho, resigned the convent in favour of Euphemia Leslie in contentious circumstances. Elizabeth later

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<sup>14</sup> *Pace* Stanford Reid, who accused him merely of time wasting: W. Stanford Reid, 'Robert Barton of Ovir Barnton' *Medievalia et Humanistica*, v, (1948), 55-6.

<sup>15</sup> *John Brown of Anstruther v Master George Forrester in Leith*, a case concerning alleged intromission with goods belonging to the former and delivered by the latter to English merchants: C.S. 5/41 fol. 9r: 15 March, 1530; and *Kirkmasters of Leith v Adam Dais*, skipper of a ship from Flanders, concerning unpaid primegilt: 5/43 fol. 72v: 13 November, 1531.

<sup>16</sup> Fraser, *Wemyss*, I, 134; *Essays on the Scottish Reformation*, (ed.) D. McRoberts, (Glasgow, 1962), 236.

alleged that the earl of Atholl and the bishop of Caithness, together with eighty armed men, violently broke down the doors of the monastery, seized her person and compelled her, in fear of her life, to make letters of procuratory resigning her rights as prioress at Rome in favour of Euphemia. According to Elizabeth, using these letters Euphemia:

‘be menys and ways of Robert lesly hir broder causit resignacioune to be maid of the said abbay of elcho And thirthrow optenit pretendit bullis of the courte of Rome And be circumventioun of oure soverane lord he nocht knowing the ground of the mater...optenit his admissioun admittand the said dame eufame to the temporalite of the said benefice’.<sup>17</sup>

Elizabeth appealed to Rome to have these bulls annulled and sought before the lords of session to have the king’s letters in Euphemia’s favour, which followed on from them, reduced. This litigation was expensive and lasted until Elizabeth’s death which occurred probably towards the end of 1529. It was vigorously defended by Robert Leslie on his sister’s behalf.<sup>18</sup> According to a charter made early in 1530 by Euphemia, in favour of her brother, Elizabeth had been removed from the administration of her office because of unspecified “excesses”.<sup>19</sup> Since then she had molested the monastery, forcibly removing its fruits and possessions, and raising legal pleas against it. In turn, this had obliged the nuns to put valuables in pledge and to contract other debts. According to the charter, Robert Leslie provided the funds to redeem the monastery’s goods from pledge and to pay its debts; he also provided money for necessities and paid for the prioress’s bulls of provision at Rome. Given his status as man of law to both the second and third earls of Atholl, it is likely that he

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<sup>17</sup> C.S. 5/38 fol. 82v.

<sup>18</sup> C.S. 5/36 fols 83r (13 August 1526), 98r; C.S. 5/37 fols 2v, 123v, 136r; C.S. 5/38 fols 4r, 18r, 19v, 82v (20 December 1527).

<sup>19</sup> Fraser, *Wemyss*, II, no. 190.

was also involved in the seizure of Elizabeth Swinton.<sup>20</sup> This event must have occurred around 1526 and so the earl complained of would have been John Stewart, the third Earl, who was at this time in his late teens.<sup>21</sup> In July 1526 pursuivants had been sent to Dunkeld to summon the earl of Atholl and the master of Ruthven for despoiling king's officers.<sup>22</sup> Evidently Atholl was later fined at the justice ayre of Perth and it was Leslie who delivered his composition of one hundred pounds to the treasurer, Master John Campbell of Lundy.<sup>23</sup> This was not the last time he would find himself responsible for making a payment to a royal official on behalf of the earl of Atholl.<sup>24</sup>

Grateful for his help, the prioress and convent acknowledged a debt to Leslie of some £290 5s 4d (although he remitted a hundred merks of this). It was arranged that compensation should be paid with a grant in feu-farm to Leslie and his heirs of the lands of Kinnaird in Fife, and an assignation of the rents of Binning near Linlithgow.<sup>25</sup> This grant in itself led to further litigation in 1536 when Archibald Swinton, a tenant of the priory in part of the lands of Kinnaird, refused to hand over the maills of those lands when Leslie demanded that he do so. Swinton's nineteen

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<sup>20</sup> See Appendices 2 and 8. Leslie was a witness to an indenture between the earl of Atholl and the bishop of Dunkeld made on 8 February, 1527, further indication of his closeness to the young earl: *Chron. Atholl*, I, 32\*\*\*.

<sup>21</sup> This is dated to 1526 because Elizabeth Swinton was alleged early in 1530 to have been bringing pleas against the monastery for three years; Cameron, *Personal Reign*, Appendix II, 580, estimated the third earl of Atholl to have been about 21 in 1528.

<sup>22</sup> *T.A.*, v, 278.

<sup>23</sup> *T.A.*, v, 331, 464.

<sup>24</sup> C.S. 6/7 fol. 97v: 4 February, 1536. On this date the lords issued a decret by which Atholl and Leslie were to pay before Easter to the comptroller, Sir James Colville of East Wemyss, £117 6s 8d. The payment was in respect of the *grassum* of certain lands to which the earl sought entry; evidently it was a composition since it represented the complete payment of 'of ane mair sowm'.

<sup>25</sup> The priory's possession of these lands was confirmed by Benedict XIII in 1418: Cowan and Easson, *Medieval Religious Houses*, 146.

year lease with the convent still had a considerable period to run, but the lords upheld Leslie's claim and directed that the rents should be paid to him on the basis of the grant made in 1530. Two years after Leslie's death, his eldest son Master Andrew, designed 'of Kinnaird', brought an action against his aunt the prioress, and several others, alleging that they had broken down the doors of his chamber in his house in Kinnaird and committed spuilzie of goods.<sup>26</sup> This episode was probably symptomatic of a deeper dispute but it appears to have been settled amicably.

It is difficult to characterise Leslie's involvement in the Elcho affair. It would be churlish to question whether he did in fact spend so large a sum of money in aid of the priory; in view of the fact that he remitted part of his expenditure, and received only modest grants in compensation for the remainder of it, he clearly had no motive of personal profit and the figure suggested can be taken as accurate. Nor was such expenditure of time, money and effort likely to have been undertaken simply to satisfy the personal ambitions of his sister. It is difficult to escape the conclusion that this was an act of personal piety on his behalf albeit influenced by family involvement; not only was his sister the prioress but his daughter, Janet, took the name Euphemia and by 1542 had also become one of the dwindling band of nuns at Elcho.<sup>27</sup> By the time of the Reformation there were only about seven nuns left when they were attacked by reformers and driven out.<sup>28</sup> This had followed an attack in December 1547 when the priory was burned by the English at which time the nuns and 'many gentleman's

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<sup>26</sup> C.S. 6/11 fol. 10v: 20 November, 1538.

<sup>27</sup> That Janet was a nun is clear from *A.P.S.*, ii, \*423; that she was at Elcho appears from an obligation subscribed in September 1554: Fraser, *Wemyss*, II, no. 209. The latter document was also subscribed by Euphemia Swinton who may have been related to Elizabeth, the earlier prioress.

<sup>28</sup> Cowan and Easson, *Medieval Religious Houses*, 146.

daughters at school with them' were removed.<sup>29</sup> Despite the aid of Sir John Wemyss, the priory, in decline since at least the 1520s, was uninhabited prior to the death of its last prioress, Euphemia Leslie, in 1570.<sup>30</sup>

Of Leslie's six children, there were four sons (Andrew, John, George and Gilbert) and two daughters (Elizabeth and Eufame). Presumably Andrew and John, who both went on to become graduates - the first becoming a lawyer, although his death in 1543 prevented his career from developing, and the latter becoming parson of Kinnoul - were involved in a transaction before the lords in 1528.<sup>31</sup> With the authority and consent of their father, they constituted Sir John Dingwall, Master William Meldrum, Sir Ninian Douglas, Thomas Lawson and Alexander Young, their procurators for raising briefes, taking sasine, resigning or alienating land or moveable goods.<sup>32</sup> The procurators were to act with Robert Leslie's advice, but they were empowered to accept benefices or offices and to resign the same *per mutationis causa vel simpliciter*. Andrew was certainly the eldest son and John was probably next eldest (or perhaps he was merely the next most suited to a university training). The wording of the constitution suggests that a church career was already being contemplated for him. Sir John Dingwall was provost of Trinity collegiate church in Edinburgh. In 1524, when he was rector of Strabrok in Linlithgow, Leslie had witnessed a charter by which he donated land to the local church and, a decade later, Dingwall named Leslie in his will

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<sup>29</sup> *Cal. Scot. Papers*, I, 56. It is possible that Leslie's own two daughters were educated at the priory in the 1520s, giving him another reason to intervene there.

<sup>30</sup> Fraser, *Wemyss*, I, 135; Cowan and Easson, *Medieval Religious Houses*, 146.

<sup>31</sup> Andrew was undoubtedly a man of law; Master George Leslie also appeared as a procurator before the lords. For instance, he appeared for William Stewart in 1546: C.S. 6/23 fol. 78r: 9 May, 1546.

<sup>32</sup> C.S. 5/38 fol. 169r: 18 September, 1528.

as one of his executors.<sup>33</sup> Meldrum was archdean of Dunkeld, and was probably a connection of Robert's father.<sup>34</sup> The others have not been traced. This decision to make procurators may represent the moment that Andrew and John were to leave the country to begin studying; no reason was given as to why their father was not named although it was laid down that the procurators could not act without his advice. The same procurators were named at the same time by Thomas Hamilton, the son of the late advocate of that name. Leslie's daughter Elizabeth later married Thomas and became the grandmother of Thomas Hamilton of Priestfield who became king's advocate during James VI's reign.<sup>35</sup> This constitution, and the subsequent marriage, suggests that Leslie was close to Thomas' late father who had an extensive practice and was probably the leading advocate in the period following Flodden until his death in 1526. Leslie inherited several clients from him as did Robert Galbraith.<sup>36</sup> Master Andrew Leslie, Robert's eldest son, may also have married into a legal family since by 1538 he was married to Katherine Henryson, possibly the granddaughter of James Henryson, king's advocate. In that year Andrew resigned the lands of Glasmonth, which he had inherited from his father, and received sasine jointly with Katherine.<sup>37</sup> After Andrew's early death Katherine, as her husband had been in 1538, was involved in another dispute concerning the lands of Kinnaird when she accused Norman Leslie,

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<sup>33</sup> *R.M.S.*, iii, no. 281: 10 November, 1524; C.S. 6/4 fol. 95v: 19 March, 1534. The other executors were Master William Gibson, dean of Lestalrig and Master Gilbert Strathauchin, parson of Fettercairn.

<sup>34</sup> *Fife Sheriff Ct. Bk.*, 92.

<sup>35</sup> *House of Hamilton*, 412-4.

<sup>36</sup> E.g. Patrick Sinclair, (represented by Hamilton at C.S. 5/27 fol. 172r); James Kennedy of Blairquhan (C.S. 5/34 fol. 46r); Sir Ninian Seton of Tullibody (C.S. 5/32 fol. 12v), Robert, Lord Maxwell (C.S. 5/32 fol. 109r) and John, Lord Glamis (C.S. 5/32 fol. 47v; 5/34 fol. 133v).

<sup>37</sup> *R.M.S.*, iii, no. 1828: 25 August, 1528.



the master of Rothies, of spuilzie of the crop cultivated there in 1544, the year after Andrew's death.<sup>38</sup>

As well as Kinnaird, Leslie held the estate of Inverpeffer in the parish of Arbroath and sheriffdom of Forfar. There is no indication of how or when he came by these lands, although he certainly had them by 1525.<sup>39</sup> In 1527 Leslie and his wife received from the abbot of Arbroath a nineteen year lease of the teinds of Inverpeffer in return for a yearly payment of wheat, barley and oatmeal to the abbey.<sup>40</sup> His relations with David Beaton appear to have been fairly close, and it was due to Beaton's influence that Leslie was custodian of the privy seal in 1529.<sup>41</sup> Three years earlier he was described in the council record as keeper of the signet. On this occasion, the lords instructed him that whenever a deliverance which might have the effect of discharging any process following on from a decret given by the lords came to be signeted, he was not to proceed without bringing the deliverance before them and taking their advice.<sup>42</sup> It is not known how long Leslie held the office of keeper of the signet, nor whether his custody of the privy seal was restricted to only a couple of occasions; nonetheless possession of either the signet or the privy seal meant potentially lucrative additional income even if it was only short term.

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<sup>38</sup> C.S. 6/21 fol. 114r: 28 July, 1546. Katherine asserted that the lands of Kinnaird pertained to her because of a lease from the abbey of Lindores. No details of her terce survive and presumably she had come to some arrangement with the abbot concerning these lands.

<sup>39</sup> NRA(S) no. 925 (Erroll Charters), no. 341: 24 April, 1525.

<sup>40</sup> *Arbroath Liber*, ii, 474: 5 December, 1527.

<sup>41</sup> *R.S.S.*, ii, Appendix, 765 (11 July, 1529), 766 (14 December, 1529). Leslie also received a gift of nonentry from James Beaton, Archbishop of St Andrews. Knowledge of this survives only because it became the subject of litigation by Master Andrew Leslie early in 1540: C.S. 6/14 fol. 161r: 11 February, 1540.

<sup>42</sup> C.S. 5/36 fol. 46r: 16 July, 1526.

Leslie's last appearance before the lords was on 31 July 1536. His date of death is unknown but it had certainly occurred by 1 December.<sup>43</sup> After his death, Leslie's estate was subject to the opportunism of James V when his corpse was exhumed in 1540 so that it could be tried for *lèse majesté*.<sup>44</sup> The allegation made against him was that in February 1529 he had conspired with Archibald Douglas of Kilspindie and James Douglas of Parkhead to assassinate the king.<sup>45</sup> During the last five years of his reign James V had become increasingly obsessed by the fear of plots against his life particularly when connected with the exiled earl of Angus.<sup>46</sup> Nonetheless there is nothing in Leslie's career that would indicate complicity with Hamilton of Finnart in a plot to kill the king. It is true that in 1530 Hamilton had sold the lands of Glasmont in Fife to Leslie, '*pro consilio et servitio*'.<sup>47</sup> But the only other evidence of direct contact between them revealed in the record is one appearance before the lords by Leslie as Hamilton's forespeaker in 1527, and Leslie's presence the following year as witness to a charter in Hamilton's favour.<sup>48</sup> Cameron has examined the evidence against Hamilton and found it wanting. The same conclusion must apply even more strongly to his alleged co-conspirator, Leslie, who was probably only on the periphery of Hamilton's circle.<sup>49</sup>

<sup>43</sup> C.S. 15/1, box containing document marked 'Renunciation of Christian Wardlaw or Leslie'.

<sup>44</sup> Kelley, *Douglas Earls of Angus*, 437, 751-2.

<sup>45</sup> *A.P.S.*, ii, 355, 366-7; 423.

<sup>46</sup> Kelley, *Douglas Earls of Angus*, Appendix III. Kelley (at 527-9) connects James' almost pathological fear to the death of his first wife in 1536 and the trials of Lady Glamis and Master of Forbes for treason in 1537. Angus was found guilty of treason in September 1528. For the political circumstances surrounding this, see Emond, *Minority of James V*, chapter 13. Angus left for England in December 1528 although, perhaps significantly, there was mention of his return in March 1528/9: Emond, *Minority of James V*, 559.

<sup>47</sup> *R.M.S.*, iii, no. 968: 7 October, 1530.

<sup>48</sup> G.D. 1/1155/1: 14 April, 1528.

<sup>49</sup> Cameron, *Personal Reign*, chapter 6.

## Leslie and his clients

Given the necessity of a lawyer, once established, residing part of the year in Edinburgh, and thus coming into contact with potential clients from throughout Scotland, the clients who tell us most about the lawyer tend to be those from his earliest years in practice. In Leslie's case, the first twenty five of his clients who can be identified with a particular geographical area came mainly from the north-east and within a reasonable radius of Perth. This covers the period 7 February 1514 to 19 March 1517. The sheriffdoms from which he gained most of his initial clients were Fife and Forfar with six clients coming from each; but Perth (3), Aberdeen (2), Kinross (1) and the burgh of Dundee (1) also feature and all of these together account for nineteen of the twenty-five (76%). His other clients in this sample came from Dumfries (2), Edinburgh (1), Berwick (1), Ayr (1) and Dumbarton (1). Apart from an appearance for Gilbert MacDowall of Spott in the sheriffdom of Dumfries in December 1514, his first client from south of the Forth was not until February 1517, when he acted for Janet Smalame, widow of the Edinburgh burgess Alexander Napier. This demonstrates that clients from the north-east were vital to Leslie at the beginning of his career.

In terms of social composition, his first twenty-five clients included four earls (and also some of their adherents), the son of the countess of Montrose, two burgesses and the widow of a burgess. He also acted for Richard Stewart, Lord Innermeath, a man who had close family connections to the north-east.<sup>50</sup> His employment by the earls of

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<sup>50</sup> *Scots Peerage*, v, 4.

Atholl, Crawford, Lennox and, in particular, Rothes, is significant in terms of patronage. These were all major landholders in the environs of Fife and Perth and, as will be shown below, they formed the centre of networks based on land tenure and service which represented one of the means by which Leslie augmented his legal practice.

Looking at his entire body of clients more widely, not all of them were given a designation in the record. Of those whose full name and designation were given, not all of them can be identified. Nonetheless, of the 286 clients for whom he appeared, the geographical origin of 262 can be stated with some degree of confidence.<sup>51</sup> By far the highest number, forty seven, came from the sheriffdom of Fife. Next in importance, the sheriffdoms of Perth (39) and Forfar (25). If Aberdeen (15) is added, and the burgh of Dundee (3) is considered part of Forfar with the regality of Dunfermline (3) included as part of Fife, then 132 of these identifiable clients, that is, just over half, came from just five contiguous sheriffdoms in the north-east of Scotland. South of the Forth, Edinburgh (20) including the port of Leith (3) and the constabulary of Haddington (7) constituted a significant recruiting ground for clients with Lanark (13), Dumfries (12) and Ayr (9), including Cunningham (3), some way behind.

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<sup>51</sup> There are doubts about some given that the same place name can appear in different sheriffdoms. Certain individuals, particularly the nobility, also held land in more than one place. Generally, the land at the centre of the litigation has been used to categorise the client unless, in the case of the nobility in particular, he was a sheriff or sheriff depute in which case that sheriffdom has been taken. Even if minor errors have been made in identification, this cannot seriously affect the conclusions.

It is useful to subdivide the whole body of Leslie's clients into smaller groups according to three criteria: geographical proximity, family relationship, or consensual relationship. In some cases there is a considerable overlap between these criteria and a combination of reasons might serve to explain why a particular client employed Leslie rather than any of the other advocates available. Conversely, in selecting these criteria it must be remembered that any of Leslie's clients might be linked to others in ways that have left no trace in the record or which would require more research to uncover. In what follows, Leslie's client list has been investigated only with a view to trying to discover how he built up business.

*(i) Geographical proximity*

This is the most obvious of the three criteria. Leslie's clients came from as far afield as the sheriffdoms of Inverness, Aberdeen, Wigtown and Roxburgh. Their designations do show that a preponderance (around 58%) came from the area described in the medieval period as Scotia (the area north of the Forth) but, taking his list of clients as a whole, such bias as there was is by no means overwhelming.

The area closest to Leslie's roots in Fife provided a large number of his clients, from the earl of Rothes down to the Dishingtons of Ardross and the laird of Raith. From Fife alone he drew almost fifty clients, with Perth and Forfar not too far behind. In Aberdeenshire, although he had only about fifteen clients, they were of no less importance, including as they did George, fourth Earl of Huntly, and men such as Andrew Tulidaff of that Ilk, Sir James Crichton of Frendraught and Alexander Seton

of Meldrum. Presumably recommendations concerning men of law passed by word of mouth amongst people of broadly equal rank in society. This would explain why all the burgesses Leslie represented, other than burgesses of Edinburgh, came from a group of burghs in Fife and the north east: Aberdeen, Dundee, Montrose, Kinghorn, Crail and Dysart. More exotically, he also acted for the burgh of Whithorn but this was not a geographically isolated case since several of his clients came from Dumfries and Wigtown. If anything, it might seem surprising that burgesses did not represent a higher proportion of Leslie's client list. In July 1517, when acting for Walter Bunche, Leslie was prepared to prove a point of custom pertaining to the burghs of Perth and Dundee. He contended that the heirs of burgesses might alienate their lands at the age of fourteen since that was the age at which they were taken to the Tolbooth to count out money and to measure cloth in order to qualify as a burghess.<sup>52</sup> Presumably, he had gone through some similar procedure in Edinburgh and, even if he had not, most leading men of law would have had knowledge of the laws of the burghs as part of their stock-in-trade. But to a large extent most cases involving burgesses before the lords of council could have been dealt with by the burgesses representing themselves, provided they lived close enough to Edinburgh and this probably explains why Leslie, and indeed other men of law, appear to have drawn only a modest number of clients from the burghs.

Outwith the north-east, and Edinburgh, the major source of Leslie's clients was Ayrshire, centred on the bailiary of Cunningham and the bailie, Hugh, first Earl of Eglinton, for whom he made more appearances than any other client. As well as the

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<sup>52</sup> C.S. 5/30 fol. 97r: 17 July, 1517.

Montgomeries, Leslie appeared for locals such as Alexander Kennedy of Bargany, James Kennedy of Blairquhan, James Dunbar of Cumnock and Margaret Boyd, Countess of Cassilis. The other major area of his client base was Lanark, a sheriffdom in which he represented at least fourteen people including the hereditary sheriffs, the first two earls of Arran.

Indeed sheriff courts, as an administrative focal point in local communities, probably formed a major recruiting opportunity for men of law such as Leslie. It is only through chance survivals that documents exist demonstrating that leading advocates in Edinburgh did appear in local courts. Even in the surviving sheriff court book of Fife, Leslie makes only one appearance. Nonetheless a significant number of those local lairds who owed suit to the sheriff court in Fife were clients of his: John Moutrie of Seafield, William Lumsden of Airdre, Walter Heriot of Burnturk, David Wemyss of that Ilk, Andrew Seton of Parbroath, David Ramsay of Cullothie, and Sir Peter Crichton of Naughton.<sup>53</sup> Both Ramsay and Crichton also held their own baron courts, as did another of Leslie's Fife clients, John Seton of Lathrisk, and no doubt he was available to assist them in doing so even if only by giving advice from Edinburgh in difficult cases.<sup>54</sup> As well as representing the sheriffs of Fife, initially John, Lord Lindsay of the Byres and then George, Earl of Rothes, Leslie also acted as one of the procurators of David Beaton, Abbot of Arbroath, who presided in the regality court. Unfortunately, the court book is lost.<sup>55</sup> But it is known who Beaton's leading friends,

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<sup>53</sup> These are taken from the index of names in the *Sheriff Court Book of Fife*, (ed.) W.C. Dickinson, (Edinburgh, 1928).

<sup>54</sup> For these baron courts, see *Sheriff Ct. Bk. of Fife*, 41, 43, 63, 273-4. Leslie also acted for William Lumsden's wife, Janet Inglis.

<sup>55</sup> Sanderson, *Cardinal of Scotland*, 23-4.



tenants and servants were and amongst them are included some of Leslie's clients such as Robert Maule of Panmure and William Wardlaw of Torrie, the brother in law of Elizabeth, one of the abbot's sisters.<sup>56</sup> No doubt they owed suit to the regality court. Similarly, some of Leslie's clients who owed suit in Fife sheriff court also did so to the regality court of Dunfermline. Amongst these included Robert Orrock, Melville of Raith and Crichton of Naughton in Kirkcaldy. Clients who owed suit only in the regality court included Sir William Scott of Balwearie, Janet Inglis, William Dishington of Ardross, Master William Lundy and Master Thomas Wemyss.<sup>57</sup> As in the sheriff court, there is only one instance of Leslie being named in the surviving record of the regality court of Dunfermline although it was as an arbiter rather than a procurator.<sup>58</sup> On the other side of the country, it is likely that Leslie met clients old and new at the bailie courts of Cunningham held in the council house of Irvine by his patron, the earl of Eglinton.<sup>59</sup> Much the same could be said about the sheriff courts of Lanark and Linlithgow, where his clients, the first two earls of Arran and James Hamilton of Kingscavil respectively, were sheriffs; and also in Dumfries, where another client, Ninian Crichton of Bellibocht, carried out the shrieval duties during the nonage of Robert Crichton, fourth Lord Sanquhar.<sup>60</sup>

It would be wrong to give the impression that Leslie had a complete monopoly on local business in any particular area. After all, most legal disputes involved near

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<sup>56</sup> Sanderson, *Cardinal of Scotland*, 58.

<sup>57</sup> *Dunfermline Regality Court Bk.*, 41, 59. *Quaere*, the Laird of Logie and Adam Dundas?

<sup>58</sup> *Dunfermline Regality Court Bk.*, 121. See below.

<sup>59</sup> For an instrument taken at such a meeting, but not mentioning the presence of Leslie, see (S.R.O.) G.D. 39/1/30 (Glencairn Muniments): 13 March, 1520.

<sup>60</sup> On Crichton, see T.I. Rae, *The Administration of the Scottish Frontier 1513-1603*, (Edinburgh, 1966), 234.

neighbours and he could hardly act for both sides. Henry Spittall, in particular, being from the north east, had a number of clients in that area, including the Forebeses and the Grahams of Montrose. In Fife, the range of Spittall's clients is impressive: it included the burgh of Dysart, William Lindsay of Pyeston, William Lindsay of Airdrie, John Beaton of Balfour, David Spens of Wormistone, Sir John Melville of Raith and Robert Orrock of that Ilk. The Melvilles and Orrocks were themselves brought together in a bond of manrent in 1520.<sup>61</sup> Robert Orrock married Spittall's widow, Elizabeth Forbes, probably in 1536.<sup>62</sup> Orrock was also one of Leslie's clients and he was not the only client shared with Spittall. For example, Richard Stewart, Lord Innermeath, William Lindsay of Airdrie, William Dishington of Ardross and Roger Herries, were all represented in different cases by both Leslie and Spittall. In the case of Innermeath and William Lindsay, Spittall acted for them in actions where Leslie appeared as opposing counsel, in the former case acting for Walter Lundy of that Ilk and in the latter for the widow of John Lindsay of Airdrie. In the other two cases Spittall acted for occasional clients of Leslie in actions where Robert Galbraith was the opposing counsel. This underlines the fact that there was no necessary exclusivity in the relationship between client and man of law. In general, particularly for clients with larger estates, it made sense to rely primarily on one advocate who might then become familiar with all the necessary details of the client's business. But it was seen in chapter two that many clients did call upon the services of more than one advocate and it would be as wrong to imagine that a litigant had a particular bond of loyalty to an advocate as it would to think that advocates would refrain from

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<sup>61</sup> Wormald, *Lords and Men*, 341.

<sup>62</sup> *Edin. Burgh Recs.*, ii, 81: 27 January 1537.

appearing against former clients. Not every relationship between a litigant and his advocate lasted a lifetime; normally, it survived only the duration of a single lawsuit.

This is exemplified in Leslie's career. Some of his clients were of long standing, whereas for others he made only a few appearances within a short space of time. Relationships in which he was involved for over a decade included those with the earl of Rothes (21 years), the earl of Eglinton (18 years), James Kennedy of Blairquhan (14 years), John Carmichael of Meadowflat (12 years) and Margaret Boyd, Countess of Cassillis (10 years). His relationship with the following clients spanned nine years: William, Lord Borthwick; Gilbert McDowall of Spott; Patrick Ogilvy of Inchmartin and John Lindsay of Covington. In the absence of a large number of documents bearing Leslie's name it is impossible to tell, in most cases, whether these long-standing, relationships produced closer personal ties than is the case with short-term clients. Ogilvy of Inchmartin can be linked with Leslie's widow and eldest son shortly after his death but, generally speaking, such links are elusive.<sup>63</sup> Of course, durability of relationship is not the same as intensity of activity especially in the context of a legal system where a single action might drag on for years. For example, Leslie acted on behalf of Hector Bruce of Coultmalindie for some nine years but only against one opponent, William, Lord Ruthven. In total, during this period he appeared on thirteen separate days arguing on Bruce's behalf in the same action.

In terms of religious houses, Leslie's most direct contact was with the priory of Elcho in Perthshire and this has already been described. Churchmen of high rank do not

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<sup>63</sup> C.S. 15/1: 1 December, 1536.

particularly feature in his client list. In particular there are no bishops or archbishops (although he did act for David Beaton, but only when he was abbot of Arbroath). This in part reflects the fact that senior churchmen often had considerable legal knowledge themselves and so had no need to hire a man of law; indeed several leading bishops and abbots were lords of session. But even experienced lawyers and law graduates such as Alexander Milne or David Beaton did on occasion use procurators. Another reason for this clerical deficiency may lie in Leslie's status as a lay lawyer; other men of law who were also secular priests might have had an advantage in recruiting such clients. Nonetheless, Leslie did represent the abbots of Arbroath, Glenluce, Holyrood, Lindores, Jedburgh and Paisley; the priors of Inchmaholme, St Andrews and Whithorn, and the prioresses of Elcho and Haddington, as well as less significant figures in the secular clergy such as the dean, and chanter of Moray, and the vicars of Perth and Inverness. There is no pattern to the monastic houses represented by Leslie: there was no discrimination on his part between Cistercian, Cluniac, Augustinian and Tironensian foundations.<sup>64</sup> Nor is there any particular geographical link between the foundations he represented, although in no case are they entirely isolated from other clients which he had in that area. This might suggest that representing a major abbey was a means of gaining other clients locally. Take for example Robert Shaw, Abbot of Paisley. Leslie first appeared on his behalf in 1526. Thereafter he began to appear for other clients in the Renfrew area, such as James Crawford of Auchinham (in 1527) and Henry Maxwell of Bishopton (in 1528). This may have drawn him to the attention of Ninian, Lord Ross, for whom he appeared in 1531. There is no way to be certain that recruitment of clients occurred in this way but it seems plausible. The abbot was

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<sup>64</sup> See Appendix 2.

not Leslie's first client in Renfrew since he was already representing John Muir of Caldwell. But this was probably the result of Muir's relationship with the Montgomeries of Eglinton which will be discussed below. Equally, appearances for lay clients in the vicinity of a priory might have led to Leslie's employment by the latter. This may have happened with the priory of Whithorn, where in the years before his appearances for the prior Leslie acted for locals such as Dame Janet Stewart, Lady Mochrum and Gilbert Graham of Knockdoliane. The importance of local knowledge in building a client base should not be underestimated.

A strictly geographical analysis of Leslie's clients does therefore provide useful insight into the importance of his own locality in their recruitment as well as the localities of figures whom he represented who were in a position of local influence and patronage. Equally significant is the fairly large number of clients drawn from the burgh of Edinburgh and its environs where Leslie spent much of his time in practice before the lords of council. From Edinburgh itself came eighteen clients, including two of his fellow burgesses with the widow of one and the son of another, and to this should be added a further eleven from the constabulary of Haddington and two from Linlithgow.

#### *(ii) Kin Relationships*

The 284 clients whom Leslie represented shared only 141 surnames. As well as fathers and sons, such as the first two successive earls of Arran or the seventh and eighth earls of Crawford; there were included siblings such as Bartholomew and

Gilbert McDowall in Dumfries.<sup>65</sup> From Fife came the Lairds Paul, Patrick, William and George Dishington whilst from the north east came Janet Gordon, Lady Lindsay, and her nephew, George, Earl of Huntly.<sup>66</sup>

Perhaps the most significant kin group represented by Leslie were the Montgomeries of Eglinton in Ayrshire. Hugh, first Earl of Eglinton, has already been mentioned as one of his major clients but the family provided him with several other clients one of whom was probably Adam Montgomerie for whom he acted in 1532.<sup>67</sup> The context suggests that Adam was related to Eglinton and tentatively he can be identified with Adam Montgomerie of Giffen, in Ayrshire, who was certainly related to the main Montgomerie line.<sup>68</sup> More easily identified is Sir Neil Montgomerie of Langshaw, a grandson of the first earl of Eglinton. In 1535 Leslie acted for him against John Boyd who sought payment of forty pounds allegedly owing to him in assythment from Sir Neil and his elder brother, Master William Montgomerie of Greenfield, as cautioner.<sup>69</sup> Seven years earlier Leslie had acted for Sir Neil's wife, Margaret Muir, heiress of Quentin Muir of Ard, in an action against William Muir of Skeldon and Hugh Campbell of Loudoun. The case concerned the lands of Ard, of which Campbell was the superior. He had entered William into these lands on the basis that he was entitled to them as heir of entail. Margaret objected to this on the basis that the entail was made by Campbell, or his predecessor, in defraud of the rightful heir. She sought to have William's sasine annulled on the basis that the charter of tailzie from which it

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<sup>65</sup> C.S. 5/37 fol. 49r: 26 March, 1527.

<sup>66</sup> See Appendix 8a.

<sup>67</sup> C.S. 5/43 fol. 150v: 10 February, 1532.

<sup>68</sup> Douglas, *Baronage*, 525.

<sup>69</sup> C.S. 6/6 fols. 24v, 47r.

proceeded was false. There was some dispute as to how many charters of entail were made; Leslie alleged that Campbell made one on 20 October 1507 but William Muir also produced one dated April 1440. Leslie therefore summoned notaries to produce their protocol books so that the authenticity of the charter might be verified. Despite various procedural objections by Robert Galbraith, acting for William and Hugh Campbell, in which he seems to have argued that the action had prescribed, and then that they should not be allowed more time to summon witnesses when none compeared, the case was resolved in favour of the pursuers. The lords found that the charter of entail relied on by the defenders was invalid because the original writing had been scraped away and it had been rewritten. This case is significant because some years prior to it Leslie had acted for a John Campbell of Skeldon, very probably an adherent of the Campbells of Loudoun. If he had faced a conflict of interest it must have been easily resolved in favour of his allegiance to the Montgomeries of Eglinton. Moreover, an allegiance to the Montgomeries was not necessarily anti-Campbell. As Neil Montgomerie pointed out in a bond of manrent with Archibald, fourth Earl of Argyll, in 1548, he himself was related to the main line of the Campbells being the grandson of Helen Campbell, daughter of Colin, first Earl of Argyll.<sup>70</sup>

The major player on the Eglinton side in the Montgomerie-Cunningham feud which raged during the reign of James V was John, Master of Montgomerie, the earl's eldest son. He was also represented by Leslie in an action of spuilzie in 1518 brought against him by Master John Forman, Chanter of Glasgow.<sup>71</sup> In the context of the Ayrshire

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<sup>70</sup> Wormald, *Lords and Men*, 80. Helen was Argyll's first wife.

<sup>71</sup> C.S. 5/31 fol. 100v: 13 July, 1518.



feud, it is worth noting that there is not a single Cunningham for whom Leslie appeared as procurator.<sup>72</sup>

The family relationship which was of most direct concern to Leslie was, of course, his own. His most significant client in Fife, and probably his most important patron, was George Leslie, fourth Earl of Rothes, for whom he made twenty nine appearances in the course of dealing with fifteen separate actions involving the earl between 1514 and 1535. It would seem likely that the agreement to represent the earl, as his chief kinsman, would have been his primary obligation and would have excepted no-one apart from the king (and perhaps his own closest relatives). When Lord Lindsay of the Byres was dismissed as sheriff principal of Fife in 1529 because he had acted partially, it is significant that Leslie did not act on his behalf even though he had acted for him on previous occasions. The case involved direct conflict between Lindsay and Robert Orrock, another man for whom Leslie had acted in the past, and this might explain his non-involvement. But the man to benefit from Lindsay's loss of office was his replacement as sheriff, the earl of Rothes, and there is a temptation to conclude that Leslie did not represent Lindsay because it was not in Rothes' interest to advance Lindsay's cause.

Leslie's closeness to Rothes can be demonstrated in numerous ways, some of which will be mentioned in the next section. At the moment only two pieces of evidence need be mentioned. On 1 December 1528 an agreement between the earl of Rothes

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<sup>72</sup> William Cunningham, parson of Hawick, did however constitute him as a procurator: C.S. 5/28 fol. 130r: 24 January, 1517.

and John Crichton of Strathord was made and registered in the books of council. Under its terms, Crichton and his wife were to appear on 11 December and upon their oath declare how much money, jewellery and other goods they had obtained from Rothes' late wife, Elizabeth, countess of Huntly, without his permission from the day she married him until the hour the agreement was made. They then bound themselves to deliver to him all of these items except 'small thingis' worth less than one hundred pounds. Added at the bottom of the folio on which this agreement appears, is a short entry as follows: 'And gif the said erle keipis nocht that day the said John is contentit that his procuratour robert lesley reassaif thir ayth for him'.<sup>73</sup> In November 1530 Rothes and Leslie, as the curators of Robert Mercer of Balleif in Perthshire, brought an action on Robert's behalf against the Perth burgess John Pyper, to remove John from lands in the burgh of Perth belonging to Robert.<sup>74</sup> Only Leslie actually required to appear. But as curators they had replaced Master Alexander McBreik, who had been Robert's tutor when the previous year Leslie had acted for his mother, Margaret Moncreiff, against him in an action concerning her terce.<sup>75</sup>

Leslie did not draw clients from the Aberdeenshire branch of the Leslie family, the Leslies of Balquhain. It was alleged before the lords in 1525, however, that he was a 'couiunct persoun' to the laird of Meldrum, Alexander Seton.<sup>76</sup> This was in the context of an action between William Forbes and Seton which was raised by Forbes,

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<sup>73</sup> C.S. 5/39 fols. 15v-16r.

<sup>74</sup> C.S. 5/41 fol. 127r: 18 November, 1530.

<sup>75</sup> C.S. 5/39 fol. 169v: 13 March, 1529. McBreik was another burgess of - and sometime bailie and dean of guild in - Perth: *Perth Guildry Book 1542-1601*, (ed.) Marion L. Stewart, (Scottish Record Society, Edinburgh, 1993), 120. He claimed to be sheriff clerk of Perth in 1523, a claim refuted by the sheriff principal, William Ruthven: C.S. 5/33 fol. 124v.

<sup>76</sup> Leslie first acted for Seton of Meldrum in 1518: C.S. 5/32 fol. 6v: 19 November, 1518. He may have done so again prior to 1525, but a large portion of the record is missing during that period.

and his procurator Henry Spittall, despite an obligation dating from 3 March 1484 which was described as an 'assurance'. Leslie alleged that this assurance, which included the kin on either side, had been broken by the raising of the action and that a penalty defined therein should now be paid.<sup>77</sup> The legal action was merely one part of what was a feud in the north east between the Forbeses and the Leslies. In 1526 both John Leslie of Kinawty and Alexander Seton of Meldrum were murdered by Lord Forbes and his kin.<sup>78</sup> When the feud was resolved in 1530, at Aberdeen, with a mutual agreement to keep the peace, only one of the witnesses, George, Earl of Huntly, was connected to Leslie although the first evidence of their relationship does not appear until some time later. Indeed, two of the witnesses - Sir Alexander Irvine of Drum and Gilbert Keith of Troup - were at the time clients of Robert Galbraith.<sup>79</sup> Apart from Leslie's connection with Seton, and despite sharing their surname, there is no evidence of a link with the Leslies of Balquhain. This is surprising given his extensive number of clients in the sheriffdom of Aberdeen, and the fact that lands in the burgh were gifted to him by the king in 1531 for gratuitous, albeit undefined, service.<sup>80</sup>

Equally significant, but more difficult to trace, are relationships by affinity. According to Dr. Wormald, marriage contracts were the weakest form of alliance in a Scotland dominated by agnatic kin groups. It was weaker than the personal bond, which directly cemented a relationship between men of different kindreds, in that marriage did not directly join the husband to his wife's kindred; nor was the wife assimilated

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<sup>77</sup> C.S. 5/35 fol. 58v: 1 July, 1525.

<sup>78</sup> *The House of Forbes*, 73.

<sup>79</sup> *The House of Forbes*, 62.

<sup>80</sup> R.S.S., ii, no. 892: 28 April, 1531. This was probably in recognition of his roles of custodian of the privy seal, and keeper of the signet.

into her husband's kin group.<sup>81</sup> A marriage alliance cannot therefore be taken as an automatic indication of closeness between the families of the husband and wife and, indeed, the client lists examined in this chapter reflect this. It would be absurd to imagine that a man of law used by the husband's family should also thereafter be used by his wife's kin. The process is more subtle and needs to be viewed from the advocate's perspective. If he is known and trusted by one kindred, then there is no reason why he should not meet and interact with their supporters and allies. Obviously, advocates were to be found in Edinburgh and some clients might be guided independently to a particular man because of his reputation alone; but the recommendation of a friend or kinsman would no doubt help.

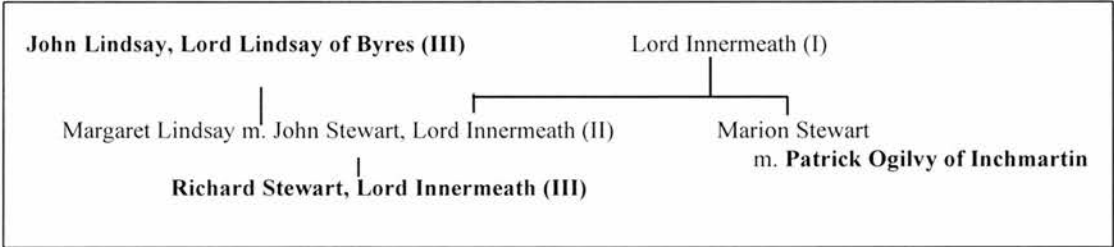
Nonetheless, the limits of taking a prosopographical approach to client lists should be stressed. The following example demonstrates the potential difficulty, although others might be given. It would not be difficult to imagine that when Patrick, Earl Bothwell, was released from ward during 1533 he decided to instruct Leslie to act for him (which he did the following year) on the basis that Leslie was Lord Maxwell's man of law.<sup>82</sup> Bothwell was linked to Maxwell through his mother, Agnes, whose second husband was Maxwell's father. Yet this involves reasoning backwards on the assumption that Bothwell's choice was inevitable. It was not. If anything, it is easier to construct a link between Bothwell and Robert Galbraith than between him and Leslie. Since Agnes was the half-sister of the earl of Buchan, who used Galbraith as his regular procurator, then had Bothwell chosen Galbraith his decision might easily

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<sup>81</sup> Wormald, *Lords and Men*, 79.

<sup>82</sup> Patrick was warded in 1531 for entering into treasonable correspondance with Henry VIII of England: *Scots Peerage*, iii, 157.

have been ascribed to his maternal link with the Stewart Earls of Buchan. After all, Agnes had a blood relationship with Buchan, but only a relationship by marriage with Maxwell and Galbraith’s relationship with Buchan was of much longer standing than Leslie’s with Maxwell. But Bothwell did not choose Galbraith, and his decision to use Leslie might have been influenced by a myriad of personal considerations about which nothing can be known. This emphasises the potential danger in making assumptions about marriage links. In the absence of extraneous information - and in most cases court appearances are the only surviving link between lawyer and client - there is necessarily an element of speculation in building a picture of how the lawyer went about building his client base. But that does not invalidate the approach, it merely counsels caution.



**Figure 6.1** (Leslie’s clients are in bold type.)

Another example of how relationships by affinity might be responsible for augmenting Leslie’s clientele, is that of one of his Fife clients John, third Lord Lindsay of Byres (see **Figure 6.1**). John’s daughter Margaret had married John Stewart, Lord Innermeath.<sup>83</sup> Their son, Richard, third Lord Innermeath, became one of Leslie’s clients. Richard’s aunt, Marion Stewart, was in turn married to a third client of Leslie, Patrick Ogilvy of Inchmartin.<sup>84</sup> This could be simple coincidence although

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<sup>83</sup> *Scots Peerage*, v, 4.  
<sup>84</sup> *Ibid.*, v, 4.

the conclusion that Richard was influenced in his choice of advocate by his grandfather John, or his uncle Patrick, cannot be discounted. To complete the picture, Margaret Lindsay's brother, Patrick, was succeeded in 1526 by his grandson, John, fifth Lord Lindsay of Byres. John, himself a client of Leslie, married the daughter of another client, John, second Earl of Atholl.<sup>85</sup> In Forfarshire, two of Leslie's clients - some fourteen years apart - were also linked by marriage: John Erskine of Dun and Alexander Durham of Grange.<sup>86</sup> The latter was married before 1525 to Erskine's daughter, Janet.<sup>87</sup>

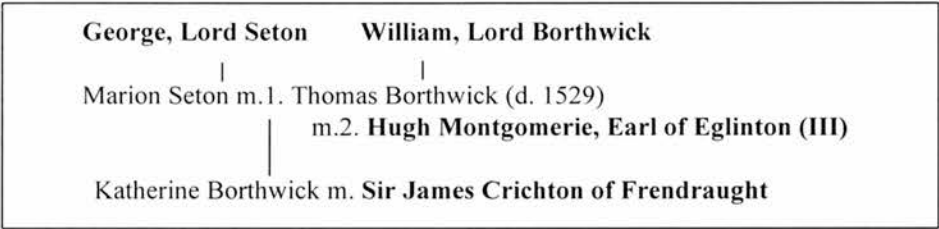


Figure 6.2 (Leslie's clients are in bold type)

More geographically removed from the north east of Scotland, Marion Seton provides a further example. Both her father, George, Lord Seton, and William, Lord Borthwick, who was the father of her first husband Thomas, were clients of Leslie. Marion and Thomas had a daughter, Katherine, who in turn married Sir James Crichton of Frendraught, one of Leslie's Aberdeenshire clients. After Thomas died in 1529, Marion herself married Hugh, Earl of Eglinton, Leslie's major client in the south west. Again, it could be a coincidence that Leslie acted for all of these people who, at first sight, have little in common. But the very fact they have so little in common is significant because without this relationship by affinity it is difficult to explain how

<sup>85</sup> *Scots Peerage*, v, 398.  
<sup>86</sup> C.S. 5/32 107r-v: 3-4 March, 1519; C.S. 6/2 fol. 168r: 5 May, 1533.  
<sup>87</sup> Douglas, *Baronage*, 472.

Leslie could have become involved with such diverse clients. The same is true in the example of Patrick, Lord Gray and his brother Gilbert, given in **Figure 6.3**, which illustrates the importance of marriage and its ramifications to building up a clientele.

Finally, widows as a group formed a significant class of clients in the sixteenth century. Often they were left to live out significant portion of their life sometimes in quite comfortable circumstances and yet their sex and, in some cases, their age, made them peculiarly vulnerable. This was especially the case should disputes arise, as they often did, between the widow and her late husband's kin (even with her own children) concerning her terce. When the threat was external, in the sense of coming from a party who was a member of neither kin, then the widow might become involved in a legal action with the blessing and advice of her sons. This occurred in the case of David Beaton, Abbot of Arbroath, and his mother Isobel Monypenny. David arranged for Leslie, as one of his own legal advisers, to act on Isobel's behalf in an action she had against James Lundie of Balgonie concerning her terce of the lands of Balfour.<sup>88</sup> This was the fourth time Leslie had acted for an opponent of Lundie of Balgonie, and he may have been involved as an adviser when a fifth client of his, William Wardlaw, made an arbitrated settlement with Lundie in 1527.<sup>89</sup> Isobel was one of over a dozen widows whom Leslie represented and in the main they were women who had been married to lesser lairds and burgesses.

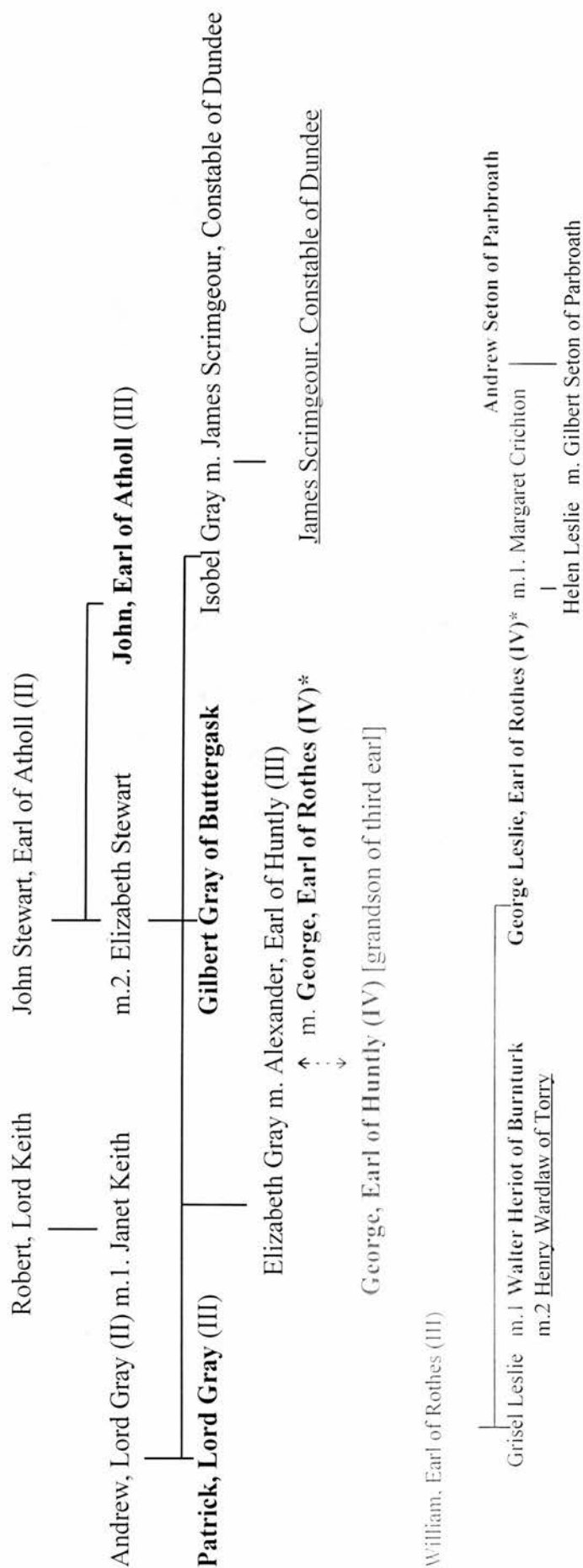
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<sup>88</sup> C.S. 6/7 fol. 150r: 15 March, 1536.

<sup>89</sup> *Prot. Bk. Foular*, ii, no. 830: 25 May, 1527. The other cases against Lundie were on behalf of David Learmonth (twice: C.S. 5/33 fols. 28v, 94v), and William Murray of Tullibardine (C.S. 5/39 fol. 79r).



Figure 6.3.



**Bold:** a party for whom Leslie appeared before the lords of session.  
Underlined: a party who constituted Leslie as one of his procurators.

(iii) *Consensual relationships*

This category primarily relates to magnatial affinities and relationships between men of whatever rank created and underpinned by bonds given consensually (even if through the necessity of acting for financial or other reasons). According to Kelham, the *raison d'être* of the affinity was service: from man to lord and *vice versa*.<sup>90</sup> As he points out, identifying the members of a magnatial affinity is necessarily a process of inference and mere kinship and geographical proximity cannot always be relied on as automatic indicators of bonds between lords and men. An instructive example of this is the fifth earl of Angus. In 1483 only half of his council were his vassals while most of the bailies on his estates had no tenorial ties to him.<sup>91</sup> Given the fact that in the reign of James V there were twenty one earldoms and only eight general procurators of the College of Justice, some advocates inevitably came to be identified with more than one magnatial affinity. The service which they provided was primarily in the form of counsel and legal representation and it is questionable whether the inference can safely be drawn from such activities that they belonged to a particular affinity. In the present context the approach taken has been not to look at the advocate's impact on, or importance within, any given affinity, but to assess the importance of the affinity in advancing the advocate's career.

Robert Leslie provides an excellent case study in this respect. Evidence outwith the council chamber strongly suggests that he was part of the earl of Rothes' affinity.

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<sup>90</sup> Kelham, *Magnatial Power*, 20.

<sup>91</sup> Kelley, *Douglas Earls of Angus*, 175.

Apart from the probable family relationship between them, at least one charter, made by the earl in 1529, was witnessed by Leslie although only its confirmation seems to survive.<sup>92</sup> The following year he was also a witness to the marriage contract, signed in Haddington, between Rothes and John Wardlaw, Laird of Torrie, for the marriage of the earl's sister Isobel and John's son and heir, Henry.<sup>93</sup> On the basis that appearances in charter witness lists provides evidence of a role in the magnatial affinity, Leslie must also be considered as a candidate for membership of the affinities of the earls of Errol, Atholl and, perhaps, Crawford. In the narrower context of representation in court, he certainly appeared on behalf of all of these as well as the earls of Arran, Bothwell, Lennox, Huntly, Eglinton and, of course, Rothes, although in the case of most of these earls no additional information concerning their links to Leslie survives.

In terms of the importance of a magnatial affinity on Leslie's burgeoning career, probably the best example, after the earl of Rothes (already mentioned in the previous section), are Alexander and David Lindsay, the seventh and eighth Earls of Crawford. Charles Kelham's work on the affinity of the fifth earl has been of value in identifying which of Leslie's clients he may have met through his connection to the seventh earl and his successor, relationships which can be traced back at least as far as 1517 when he witnessed a charter by David, Master of Crawford, granting lands in Perthshire, and appeared before the lords of council on behalf of his father.<sup>94</sup> The definite Lindsay adherents represented by Leslie are as follows: Thomas Fotheringham of Powrie, Thomas Ogilvy of Clova, John Lindsay of Covington, Robert Carnegie of Kinnaird,

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<sup>92</sup> *R.M.S.*, iii, no. 717.

<sup>93</sup> C.S. 5/40 fol. 54r: 8 June, 1529. The other witness to the contract was Bernard Bailie, another man close to the abbot of Arbroath: Sanderson, *Cardinal of Scotland*, 58.

<sup>94</sup> *R.M.S.*, iii, no. 180.

Richard Stewart, Lord Innermeath, Robert Maule of Panmure, Andrew Guthrie of that Ilk and John Carmichael of Meadowflat, Captain of Crawford castle.<sup>95</sup> Of these eight clients three were from Forfar, three from Perth and two from Lanarkshire and apart from the common denominator of adherence to Crawford there is no obvious link between them.<sup>96</sup> Ogilvy of Clova, however, was one of the tenants of the kirk of Alyth in Menmuir, which pertained to the bishopric of Dunkeld. A connection through his father might explain why Leslie acted for these tenants in 1524 against Lord Glamis and George Hepburn, vicar general of Dunkeld, in a dispute concerning payment of teinds.<sup>97</sup> Certainly Leslie was clearly identified with Lindsay of Covington even to the extent that he complained on one occasion that John Campbell, the treasurer, had known well that Leslie was Covington's procurator and had chosen to call a summons against him when Leslie was absent.<sup>98</sup>

Clearly his early start with the earls of Crawford was of considerable value to Leslie because it allowed him to recruit numerous clients from the ranks of their adherents. The effect that success like this had on his reputation probably had a knock-on effect and may have brought him significantly more than those eight clients named above. For example, Robert, fifth Lord Maxwell, was served heir to his father in lands in Lanarkshire which he then held of Lindsay of Covington.<sup>99</sup> Maxwell was an important

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<sup>95</sup> The Fotheringhams of Powrie were also important vassals of the earls of Angus in the regality of Kirriemuir, however as Kelley points out, their primary allegiance was to the earls of Crawford: Kelley, *Douglas Earls of Angus*, 139-141.

<sup>96</sup> To this list can probably be added master Charles Fotheringham, Parson of Edzell, who constituted Leslie in 1524 but for whom Leslie is not recording as appearing.

<sup>97</sup> C.S. 5/34 fol. 133v: 1 March, 1524.

<sup>98</sup> C.S. 5/33 fol. 83r: 11 December, 1522.

<sup>99</sup> C.S. 5/26 fol. 150v: 20 July, 1514: *Robert, Lord Maxwell v John Lindsay of Covington*, concerning his service to the lands of Waranhill in the sheriffdom of Lanark. Lindsay was absent from the realm and the lords decided that Robert should be served as heir to his late father on Lindsay's return.

figure and a significant client for Leslie on the West March of which he was Warden, as well as holding the offices of steward of Annandale, steward of Kirkcudbright, sheriff of Dumfries and keeper of Lochmaben castle. The tenorial link with Lindsay of Covington aside, Maxwell was linked by service to other Leslie clients. John Carmichael of Meadowflat, like Covington part of the Crawford affinity, entered into a bond of manrent with Maxwell in 1528.<sup>100</sup> Carmichael had been a client of Leslie's since 1524 and Leslie did not appear for Maxwell until the 1530s. But it is not possible to infer whether he did so through the influence of Carmichael, or Lindsay, or even his wife, Lady Bothwell. Leslie can be directly linked with two other men close to Maxwell, his brother-in-law Alexander Jardine of Applegirth and John Armstrong who entered a bond of manrent with him in 1525. Three years after this, Leslie and Jardine were named by Armstrong as procurators for resigning his lands in Langholm.<sup>101</sup> Another Leslie client, Thomas Kirkpatrick of Closeburn, was also to make a bond of manrent with Maxwell but not until 1543. This is the opposite situation from that described in relation to the earldom of Crawford. Instead of a geographically diverse earldom providing the means to obtain clients in sheriffdoms far removed from one another, Leslie also made use of local networks to meet the same objective. Rather than kin relationship or mere proximity, the key element here was service to a local figure. Of course, other men of law might tap into the same network although moving from a different point of origin. Thus James Douglas of

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<sup>100</sup> William Carmichael of Meadowflat was captain of Crawford castle at least from early in James IV's reign and may have succeeded John Lindsay of Covington who was bailie of the barony of Crawford Lindsay in the 1470s: Kelley, *Douglas Earls of Douglas*, 171.

<sup>101</sup> Fraser, *Caerlaverock*, II, 465, no. 84.

Drumlanrig and James Gordon of Lochinver, both clients of Robert Galbraith, also made bonds of manrent with Lord Maxwell in 1518 and 1525 respectively.<sup>102</sup>

In Ayrshire, another local network operated to Leslie's potential benefit. It was centred on the Montgomeries of Eglinton and included the Muirs of Caldwell who were their close neighbours. John Muir, Laird of Caldwell, entered into a bond of manrent with Earl Hugh in 1527. This was prompted by Caldwell's financial difficulties stemming from a lawsuit which followed an attack he had unwisely made on chancellor James Beaton's residence in Glasgow in 1515 prior to the arrival of the regent, Albany.<sup>103</sup> Although John Lethame was his procurator in 1517, defending Beaton's action of spuilzie, Leslie had become his man of law by 1524.<sup>104</sup> The bond of manrent cemented a marriage link between the two families with Caldwell's eldest son having married Eglinton's daughter and it would be reasonable to assume that Leslie became involved with the Muirs of Caldwell because of his Eglinton connection. The link with both families was maintained when in 1527 Leslie represented Margaret Muir, who was the wife of Neil Montgomerie. In 1534 David Caldwell produced in court a bond stating that he, and his heirs, had become man and servant to Eglinton for all the days of his life.<sup>105</sup>

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<sup>102</sup> Wormald, *Lords and Men*, 334-5.

<sup>103</sup> *Caldwell Papers*, I, 10: 19 October, 1527.

<sup>104</sup> This dispute was still ongoing in 1518 with Lethame again acting as the laird of Caldwell's forespeaker: C.S. 5/30 fol. 210r: 1 March, 1518.

<sup>105</sup> C.S. 6/5 fol. 82r: 23 July, 1534. Unfortunately, there is no indication of why Caldwell was required to produce this document.

## Part Two: The career of Robert Galbraith

Robert Galbraith had his origins in Berwickshire, the son of David Galbraith of Kimmergame, a lesser laird and a tenant of the Homes of Wedderburn. There is nothing particularly notable about this minor branch of the Galbraith family: it did not even merit a mention in Home of Godscroft's history of the Homes of Wedderburn published in 1611. According to a recent authority, the Galbraiths of East Windshiel, as they had become known by the mid-sixteenth century, were at that time still lesser Berwickshire lairds with no evidence of upward social mobility.<sup>106</sup>

Nothing is known of Robert's early life until he came to prominence in Paris in the early 1500s as a professor of law at the College de Coqueret. Presumably he had also studied in Paris or, at least, in a French university. Recent study has revealed the significance of Galbraith's academic work on philosophy and he is regarded as an important figure in the circle of John Major.<sup>107</sup> In 1510 Galbraith dedicated his major work on logic, *Quadrupertitum*, to James IV's advocate James Henryson. Given the obscurity of Galbraith's early life it is impossible to know whether he personally knew or corresponded with Henryson. The latter was a graduate of Paris and his nephew James Foulis, later clerk register, was one of Galbraith's students and it is certainly possible that they had corresponded. Another of his Scots students was Thomas Bellenden, who was director of chancery by 1514 and later justice-clerk general.<sup>108</sup>

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<sup>106</sup> M. Meikle, *Lairds and Gentlemen*, 489.

<sup>107</sup> A. Broadie, *The Circle of John Major: Logic and Logicians in Pre-Reformation Scotland*, (Oxford, 1985), 4-5.

<sup>108</sup> For Bellenden as director of chancery, see C.S. 5/26 fol. 174r: 23 October, 1514.



With his successful track record in law and philosophy, and perhaps known also as a poet, Galbraith no doubt returned to Scotland with considerable aspirations. His return should probably be dated to 1515, since his first appearance before the lords of council was in August of that year although his first constitution as a procurator before them was not recorded until 11 January, 1516.<sup>109</sup> There is no evidence of a link between Galbraith and the duke of Albany and his return to Scotland was probably independent of the new governor's arrival on 16 May, 1515.

It seems likely that Galbraith returned in order to pursue a legal career. That this was his long term aim may be inferred from the dedication to Henryson, although in the event Galbraith arrived too late to profit from the latter's undoubted influence in royal and legal circles. His main family connection was with the Homes, staunch allies of the earl of Angus and, after his marriage to her in the summer of 1514, of Margaret Tudor. Lord Home's involvement in the confused politics of the period were to have fatal consequences. Within months of arriving in Scotland, Albany sought to secure possession of the young king and his brother. Lord Home was one of those to whom Margaret was prepared to surrender possession of her sons, although Albany rejected him as untrustworthy given his support for Angus. It was at this point that Lord Home became embroiled in a plot by Lord Dacre to kidnap the king from Stirling castle where Margaret was being besieged by forces loyal to the Governor. Emond suggests Home broke with Albany, whose return he had hitherto welcomed, because of disappointed ambition. Whatever the reason, it had disastrous consequences, with

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<sup>109</sup> C.S. 5/27 fol. 54r: 17 August, 1515; C.S. 5/27 fol. 135r: 11 January, 1516; Emond, *Minority of James V*, 81.

Home, his four brothers, and David Heriot of Trabroun all charged with treason.<sup>110</sup> Albany raised significant forces in pursuit of Home, and the pressure he exerted led David Home of Wedderburn to compear before the lords of council in August 1515 and swear not to give aid to Lord Home but rather to pursue him at his utmost power.<sup>111</sup> This was clearly expedient but Home of Polwarth also gave the same oath and in the circumstances they had little choice. This growing crisis amongst the Homes may have been the trigger that led to Galbraith's return. It is noticeable that in April, 1516, he acted before the lords on behalf of David Home of Wedderburn, his father's landlord and the earl of Angus' brother-in-law. Although Lord Home and his brother William were not executed until the following October, it seems that Home of Wedderburn had done enough to distance himself from them, albeit temporarily. Galbraith's career does not ultimately appear to have suffered. Indeed the events of 1515 and 1516 may have helped him in that the support for Queen Margaret among the Homes in 1515 may have influenced her in his favour when looking for an advocate in 1517. By the time of the revenge killing of Albany's deputy, Seigneur De La Bastie, by Home of Wedderburn in September, 1517, Galbraith was already acting for Margaret Tudor and indeed Margaret was even prepared to defend Home's involvement in the murder.<sup>112</sup> In the difficult circumstances of the following years Galbraith may have kept in touch with Home of Wedderburn. After his death, George Home, his son and heir, was represented by Galbraith early in 1525 in a sheriff court of Berwick held in Edinburgh where Galbraith required the sheriffs *in hac parte* to appoint officers of the court for serving George as heir to his father. Amongst those

<sup>110</sup> Emond, *Minority of James V*, 88-9.

<sup>111</sup> C.S. 5/27 fol. 56v; 27 August, 1515.

<sup>112</sup> Kelley, *Douglas Earls of Angus*, 292.

appointed was Galbraith's nephew Simon Fortune as sergeant and John Galbraith, presumably another relative, as dempster.<sup>113</sup>

Within a year of his first appearance in Scotland after his return from France, Galbraith can be found as a witness to the transumpt made in St Giles by the commissary of St Andrews, Master Matthew Kerr.<sup>114</sup> This placed him in the company of three men destined to become leading lawyers and judges during the personal reign of James V: John Lethame, Henry Lauder and his former pupil, James Foulis. Like Leslie, Galbraith was made a burges of Edinburgh. Although his name does not appear on the burges roll, he was definitely a burges by March, 1526.<sup>115</sup> A decade earlier he had been one of a number of people asked to convene in the Tolbooth to advise the council of Edinburgh concerning certain leases and his admission as a burges may have been for this, and perhaps similar services to the burgh, and may date from soon after his return to Scotland.<sup>116</sup>

Although designed as a chaplain in 1526, it was not until around 1528 that Galbraith held an ecclesiastical position which can be more closely identified.<sup>117</sup> From this time he was treasurer of the chapel royal in Stirling, a post which his relationship with the queen mother was no doubt instrumental in securing since Stirling castle was part of Margaret's tocher. By the time he was made a lord of session, in November 1537, Galbraith had become parson of Spott. This latter appointment probably reflects the

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<sup>113</sup> H.M.C., *Milne-Home*, 34-5.

<sup>114</sup> *Midlothian Chrs.*, 87ff. 16 August, 1516.

<sup>115</sup> *Yester Writs*, no. 424: 8 March, 1526.

<sup>116</sup> *Edin. B.R.*, I, 150: 18 April, 1516. Galbraith's name follows that of Adam Otterburn, common clerk of the burgh, and Thomas Hamilton, both noted lawyers.

<sup>117</sup> *Prot. Bk. Foular*, ii, no. 668: 28 February, 1526; Watt, *Fasti*, 339.

fact that for some time he had been acquiring land in East Lothian. In 1523 he purchased the lands of East Windshiel in Berwickshire from David Renton of Billie, an in-law ('*genero*') of Galbraith's client, Sir William Sinclair of Hirdmanston.<sup>118</sup> Five years later he purchased the neighbouring estate of Mid Windshiel from Thomas Redpath.<sup>119</sup>

Galbraith acquired land not only through purchase but also through gift and distraint. Already by 1520 he can be found taking an annualrent from a large house in Edinburgh from Margaret Whitehead as security for a debt. Galbraith signed a reversion under which Margaret could redeem the annualrent on payment of £160.<sup>120</sup> Margaret was clearly in financial difficulties because the previous year she had resigned a tenement to Janet Paterson in return for a loan, a transaction which Galbraith witnessed.<sup>121</sup> Margaret's financial position did not improve because in 1521 the large house from which Galbraith enjoyed an annualrent was conveyed to him, again under reversion of £160.<sup>122</sup> A few months later Margaret redeemed an annualrent held in another property by Andrew Touris, only to transfer it to Galbraith.<sup>123</sup> Things must have looked bleak for her, because the next month Galbraith purchased from John Craik some waste ground neighbouring the large house which he held as security for one of Margaret's debts.<sup>124</sup> Four years later, Margaret named Galbraith as one of her procurators to resign a small annualrent on her behalf although

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<sup>118</sup> *R.M.S.*, iii, no. 833: confirmation, 3 September, 1529.

<sup>119</sup> *R.M.S.*, iii, no. 605; (S.R.O.) G.D. 216/1 (Cockburn of that Ilk): 5 July, 1528.

<sup>120</sup> *Prot. Bk. Foular*, ii, nos. 136, 137: 17-18 November, 1520.

<sup>121</sup> *Prot. Bk. Foular*, ii, no. 5: 5 July, 1519.

<sup>122</sup> *Prot. Bk. Foular*, ii, no. 183: 4 March, 1521.

<sup>123</sup> *Prot. Bk. Foular*, ii, no. 249: 9 November, 1521.

<sup>124</sup> *Prot. Bk. Foular*, ii, no. 31 December, 1521.

there is no indication that she did so in security of a debt. Margaret was dead by September 1529, when one of her four daughters, Agnes Liddel, used Galbraith as her attorney to obtain sasine of her part of an annualrent in yet another property.<sup>125</sup> Shortly after this, their mother's debts caught up with them and, for unpaid rents of lands in Ettrick Forest held of the queen, their property was appraised.<sup>126</sup> Queen Margaret resigned an annualrent worth 2 merks from the proceeds in favour of her advocate Galbraith.<sup>127</sup> Unlike the queen, there is no evidence that Margaret Whitehead was ever one of Galbraith's clients. Consequently it must be presumed that the debts she owed to him - as to others - were pure money debts and that, like other men of law, he was involved in money-lending. In 1527 Galbraith purchased land next to the tenement which he had obtained as Margaret's creditor on the north side of the High Street.<sup>128</sup> This augmentation replicated his behaviour with the estates of East and Mid Windshiel in Berwickshire. To these he could add in 1539 the gift of the lands of Worcley in Berwickshire, which had fallen to his client Patrick, Earl Bothwell, through nonentry, and which Patrick gifted to Galbraith.<sup>129</sup>

Further gifts came to Galbraith from the king. In 1529 he received the nonentry of certain lands in Edinburgh and two years later the king granted him the wardship of Hirdmanston in Haddington following the death of William Sinclair which occurred at Candlemas (2 February), 1531.<sup>130</sup> These may have been in appreciation of services

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<sup>125</sup> *Prot. Bk. Foular*, iii, no. 154: 27 September, 1529.

<sup>126</sup> *R.M.S.*, iii, no. 869: 24 December, 1529.

<sup>127</sup> *Prot. Bk. Foular*, iii, no. 221: 12 April, 1530.

<sup>128</sup> *Prot. Bk. Foular*, iii, no. 791a: 6 March, 1527.

<sup>129</sup> C.S. 6/11 fol. 150r: 16 February, 1539.

<sup>130</sup> *R.S.S.*, ii, no. 414: 2 November, 1529; *R.S.S.*, ii, no. 820: 10 February, 1531. For Sinclair's death, see C.S. 5/43 fol. 67v: 9 November, 1531.

performed by Galbraith on behalf of the king's mother, or as treasurer of the chapel royal, or even for services on behalf of the king himself since he did act briefly as substitute for the king's advocate.<sup>131</sup>

It is clear that Galbraith had property in Edinburgh well placed for attendance in the Tolbooth and also for carrying on business. There are several references to legal transactions taking place in his chamber.<sup>132</sup> In 1524 he received sasine of another tenement on the north side of the High Street which, a year later, he granted to another man of law, Master Abraham Crichton, reserving to himself a small annualrent.<sup>133</sup> Galbraith had known Crichton at least since the summer of 1517, when he acted for John Crichton, the nephew and heir of the late Adam Crichton of Ruthvenis, when Abraham was John's tutor.<sup>134</sup> All the signs indicate that Galbraith's career and finances were prospering. Then suddenly in 1536 there is a reference to a fee being paid to the royal messenger Alexander Hutton for arresting Galbraith's goods.<sup>135</sup> This arrestment should not be taken as an indication of financial difficulties. It was probably made by Abraham Crichton, by then parson of Chirnside in Berwickshire (and, from 1540, official of Lothian), since the two were involved in a dispute concerning the teinds of Hirdmanston and Salton in East Lothian which Crichton alleged were assigned to him by the abbot of Dryburgh.<sup>136</sup> The matter came to an end when Crichton put the value of the teinds to Galbraith's oath and Galbraith swore to a

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<sup>131</sup> See chapter seven.

<sup>132</sup> E.g., (S.R.O.) N.P. 1/2A fols. 35r-v: 16 May, 1532. See Appendix 8 for other examples.

<sup>133</sup> Prot. Bk. Foular, ii, nos. 506, 643: 8 October, 1524; 20 October, 1525.

<sup>134</sup> C.S. 5/30 fol. 120v: 28 July, 1517.

<sup>135</sup> *T.A.*, vi, 266.

<sup>136</sup> C.S. 6/7 fol. 172v-174v: 29 March, 1536; C.S. 6/8 fol. 25r: 24 May, 1536. In July 1527, Crichton was designed parson and vicar of the kirk of Crawfordjohn: C.S. 5/37 fol. 145v: 9 July, 1527. At some point after 1536 he became provost of Dunglas.

certain valuation.<sup>137</sup> Presumably the arrestment was then removed. Certainly it did not prevent Galbraith being sworn in as a lord of session on 7 November the following year.<sup>138</sup> Although this appointment did not necessarily mean the end of his activity as an advocate, it is the date from which Galbraith should more properly be seen as a judge and no attempt has been made to continue to compile his client list during his years as a senator of the College of Justice.

Robert Galbraith was murdered by John Carkettle of Finglen and his accomplices in the kirkyard of the Grey Friars, on the morning of 27 January 1544, at the time of divine service.<sup>139</sup> Allegedly the murder was in revenge for favour shown by him to Sir William Sinclair of Hirdmanston in a legal action.<sup>140</sup> Since there is a gap in the record at the time of the killing, it is not possible to confirm whether such an action took place nor whether the accusation had any basis in truth. But the pre-existing relationship between Galbraith, his nephew Simon Fortune, and their family with the Sinclairs of Hirdmanston, which may have stretched back several generations, at least makes it plausible.<sup>141</sup> The murderer was certainly Carkettle who was himself, as a burgess of Edinburgh, certainly not unknown to Galbraith; for instance, both were executors of Janet Paterson in 1534.<sup>142</sup> The killing provoked fear amongst the members of the College of Justice which prompted the Governor, Arran, to order that

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<sup>137</sup> C.S. 6/8 fol. 41r: 31 May, 1536.

<sup>138</sup> C.S. 6/9 fol. 2r: 7 November, 1537.

<sup>139</sup> C.S. 7/8 fol. 386v: 31 January, 1553.

<sup>140</sup> Hugo Arnot, *Criminal Trials*, (Edinburgh, 1785), 155.

<sup>141</sup> In 1379, John Sinclair of Hirdmanston was granted the lands and village of Kimmerghame, later held by David Galbraith: Kelley, *Douglas Earls of Angus*, 150-3, citing (S.R.O.) R.H. 1/2/141. The Sinclairs retained the land until 1467, when the laird, John Sinclair, died and his daughters married George Home of Wedderburn and Patrick Home of Polwarth who each took over as vassals of the earl of Angus in Kimmergame. As was shown above, David Galbraith became tenant of the Homes of Wedderburn.

<sup>142</sup> (S.R.O.) N.P. 1/2A fol. 63r: 24 June, 1534.



the killers be pursued with all rigour of law and to declare that henceforth anyone who killed a judge, advocate or scribe of the College committed lèse majesté.<sup>143</sup> Carkettle and his accomplices, William Ken, James Gibson and Alexander Thomson, were threatened in March, 1544, with escheat for the 'treasonable slaughter'.<sup>144</sup> Less than two months later, however, they received a remission.<sup>145</sup> They had bought their way out of trouble by offering to pay assythment to Galbraith's heirs. In January 1549, Carkettle and Gibson were ordered to relieve cautioners found on their behalf before the justice court.<sup>146</sup> His executor, his cousin Master Adam Galbraith, devoted twenty pounds, from the assythment of £500, to provide a chaplain to pray for Robert's soul in St Giles.<sup>147</sup> Galbraith's house on the High Street became the property of Master Adam who by the mid-1550s was rector of Mordington in Berwickshire.<sup>148</sup> Another of his heirs was his nephew, Robert Galbraith, probably the son of his brother Simon. As assignee of the late Robert, this nephew was involved in an arbitration with Sir James Stirling of Keir in 1551 concerning the lands of Ballindrocht which must have been held by the judge during his lifetime although there would appear to be no contemporary record of this.<sup>149</sup> Robert subsequently became a monk at the abbey of Glenluce, perhaps through connections gained by his uncle who had acted for the abbey on several occasions.<sup>150</sup> It might be thought that Galbraith was then forgotten. But he still had a contribution to make to Scottish legal history because a manuscript which he compiled, was later used by James Balfour in compiling his *Practicks*. This

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<sup>143</sup> *A.D.C.P.*, 537.

<sup>144</sup> *R.M.S.*, iii, no. 668: 22 March, 1544.

<sup>145</sup> *R.S.S.*, iii, no. 752: 3 May, 1544.

<sup>146</sup> *A.D.C.P.*, 638.

<sup>147</sup> *A.D.C.P.*, 638.

<sup>148</sup> *Prot. Bk. Alexander King*, no. 16: 11 July, 1555.

<sup>149</sup> Fraser, *Stirlings*, 403: 7 May, 1551.

<sup>150</sup> *Prot. Bk. Alexander King*, no. 88: 10 March, 1556.

manuscript, in excess of six hundred folios in length and containing a version of the treatise *Regiam Majestatem* as well as various statutes and other conventional legal material, was not only subscribed by Galbraith but bears evidence that it belonged after his death to Robert Reid, Bishop of Orkney and the second Lord President of the College of Justice.<sup>151</sup> Despite Reid's ownership, Balfour referred to the manuscript as the *Liber Galbraith* and this suggests that Galbraith's reputation as a lawyer survived him for at least a generation.<sup>152</sup>

### **Galbraith and his clients**

It is proposed to analyse Galbraith's client list using the same approach with which that of Leslie was considered earlier. From 17 August 1515 to 9 March 1517, Galbraith represented thirty three clients of whom twenty five can be placed geographically. Looking at these first twenty five clients, twenty three of them (92%) came from south of the Forth. Of these ten came from the Marches, with most coming from east March with four each from the sheriffdoms of Berwick and Roxburgh, and one each from Dumfries and Wigtown. The rest came from Edinburgh (2), Haddington (2), Linlithgow (1), Ayr (3), Lanark (3) and Renfrew (1). The two northern clients were the parishioners of the subdeanery of Brechin, and John, Lord Drummond, who was steward of Strathearne. The balance lies towards the south east and the importance of Berwick and Roxburgh in particular should be noticed. Although his home area was not quite so productive as Fife and Perthshire was for Leslie in his early years, clients from the Borders were certainly important for

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<sup>151</sup> This manuscript is now known as the Cambridge MS.: *A.P.S.*, i, 192-3.

<sup>152</sup> *B.P.*, introduction, lx.

Galbraith and there were certainly political factors during this period which may have resulted in fewer clients from Berwickshire than might otherwise have been the case.

Unlike Leslie, Galbraith did not represent any major magnates in this early phase of his career. The first time he represented an earl, it was the earl of Angus in 1518; indeed it took him a decade until the number of earls he had represented reached four, whereas Leslie achieved this target in just over four years. His three most notable initial clients were the abbot of Melrose, John, Lord Drummond, and Margaret Tudor. But generally he began by dealing with lairds, burgesses, and tenants; in short, the middling sort, rather than those who might have offered him patronage and introductions to other clients. This might be put down to his own modest birth and his lack of personal ties with the nobility although, on the other hand, it was his relationship with the Homes and the earl of Angus which probably brought his name to the attention of Margaret Tudor.

Looking more widely at Galbraith's client list as a whole, out of 258 clients the designations of only 215 can be placed geographically. These were divided more evenly throughout the realm than the clients of Robert Leslie. Edinburgh was the sheriffdom from which he attracted the most clients, twenty, with four from Linlithgow, two from Leith and fifteen from the constabulary of Haddington. All of these together represent less than 20% of his clientele. Ayr (16 clients), Dumfries (14), Perth (14), Fife (11), Roxburgh (10) and Aberdeen (10) were the other main sheriffdoms which provided him with clients. Sheriffdoms such as Galloway (3), Kirkcudbright (5), Wigtown (2), Selkirk (1), Inverness (7), Nairn (1), Forres (1),

Forfar (9), Renfrew (5) and Lanark (6) illustrate how diverse his client base was. This confirms the impression given by looking at Galbraith's earliest clients, and strongly suggests that he built up his practice in Edinburgh, predominately on the basis of his reputation, rather than from extensive local patronage although, of course, that was also an element.

i) *Geographical proximity*

Although Galbraith's clients were less geographically concentrated than was the case with Robert Leslie, the same percentage (58%) of Galbraith's clients came from south of the Forth as, in Leslie's case, came from the north.<sup>153</sup> In terms of the sheriffs of the five Border sheriffdoms, Galbraith represented two of them: Patrick, third Earl Bothwell (Sheriff of Berwick) and John Hay, third Lord Yester (Sheriff of Peebles). Although he did represent Robert Crichton, fourth Lord Sanquhar (who was the hereditary sheriff of Dumfries) this was during his minority, when the duties of sheriff were carried out by Ninian Crichton who was mentioned earlier as one of Leslie's clients.<sup>154</sup> The sheriff of Selkirk, James Murray of Fallahill, was represented by Henry Spittall, and the sheriff of Roxburgh, James Douglas of Cavers, although he did constitute Galbraith as one of his procurators in 1519, was never represented by him.<sup>155</sup> From Galbraith's point of view, this is not a bad showing particularly when added to other court holders such as the earl of Buchan, Sheriff of Banff, Lord Drummond, Steward of Strathearne, Campbell of Loudoun, Sheriff of Ayr, Lord Gray, Sheriff of Forfar, Lindsay of Byres, Sheriff of Fife, John, Lord Erskine, Sheriff

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<sup>153</sup> See **Figure 6.4** below.

<sup>154</sup> Rae, *Frontier*, 234.

<sup>155</sup> In 1532, Douglas of Cavers named Spittall as his only procurator.

of Stirling, William, Master of Ruthven, Sheriff of Perth and Archibald Dunbar, Bailie of the regality of Glasgow, to name just a few of those whom he represented.<sup>156</sup> It is not to be expected that Galbraith attended the courts held by his clients with any regularity, given the demands on his time this would have created. The number of cases involving accusations of improper procedures being used by sheriffs for whom he acted indicates that he was rarely, if ever, on hand to offer advice when sheriff courts were being held.

The five burgesses for whom Galbraith acted were drawn from Ayr, Dumfries, Edinburgh, Haddington and Montrose and offer no geographical pattern. In terms of ecclesiastical foundations, however, patterns do emerge. This is most notable in the diocese of Ross, where he acted for the archdean, subdean and chanter.<sup>157</sup> At a higher level, he represented important abbots in the south of Scotland from the abbeys of Melrose, Kelso, Newbattle and, in the west, Glenluce. In the north east he also acted for the abbeys of Deer and Scone. His reputation locally in the Borders may have helped him at Melrose and Kelso, and also with Christian McDowall, Prioress of Eccles in Berwickshire, for whom he acted in 1529. It is somewhat surprising that he did not act for John Home, Abbot of Jedburgh, given his family background. He did however act for several influential figures, such as John Hepburn, Prior of St Andrews, Elizabeth Swinton, Prioress of Elcho and Elizabeth Hepburn, Prioress of Haddington. The pattern of his activity for the prioress of Haddington is interesting

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<sup>156</sup> To this should be added earl Bothwell who was also hereditary sheriff of Edinburgh; his son, Patrick, Master of Hailes, as sheriff depute of Edinburgh was twice represented by Galbraith in 1527. In that year he also appeared, albeit on only one occasion, for Henry Stewart, Sheriff depute of Banff. He also acted for earl Marischall, Sheriff of Kincardine, and the earl of Huntly, Sheriff of Aberdeen; and Lord Somerville, Baron of Carnwath.

<sup>157</sup> C.S. 5/33 fols. 65v, 67v; 5 December, 1522; C.S. 5/34 fol. 169v; 25 May, 1524.

since Galbraith was acting for her against another of his clients, John, Lord Hay of Yester. Elizabeth secured his services first, in a case in 1526 involving the perambulation of various lands bordering the estates of Lord Hay, a dispute that quickly went to arbitration and which shall be mentioned again later. In 1528 and 1529, Lord Hay used Galbraith as his procurator in two actions.<sup>158</sup> Then in 1533 Elizabeth brought a further action against Hay, claiming that she had again been impeded in using a common passage and that Lord Hay and his accomplices had stopped a cart full of wood for fuel being carried from Nunhope to the priory. Nunhope was one of the lands in dispute in 1526. Hay on this occasion appeared by Henry Spittall. It is likely that he could not use Galbraith because Galbraith was bound to act for Elizabeth on the basis that she had constituted him first and that any subsequent agreement to act for Lord Hay would doubtless have excepted her. The basic idea seems to have been *prior tempore potior iure*, although that phrase was not used. Galbraith may have acted for the prioresses of Eccles and Haddington through his connection to other members of the McDowall or Hepburn families for whom he acted. There is no obvious connection between these foundations and any of his other clients in their locality.

In the south west he represented Patrick Sinclair of Spottis in the stewartry of Kirkcudbright. The original superior of the lands of Spottis had been John Gordon of Lochinver who lost the superiority when the lands were recognised by James IV. Sasine was then given to Patrick Sinclair, the king's familiar, although the lords later

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<sup>158</sup> One of these was against Elizabeth Cunningham, Lady Belton, his grandmother. Lord Hay had been factor of her estates. Cameron, *Personal Reign*, 186, assesses the significance of this case, and Lord Hay generally.

annulled this infeftment. In February, 1517, the lands were granted to Andrew McDowall, who had received the gift of the nonentry of the lands a year before, to be held of Gordon of Lochinver who had evidently recovered the superiority.<sup>159</sup> In 1527 Galbraith acted for Sinclair against Gilbert, brother and heir of Bartholomew McDowall (and probably Andrew's nephew) in order to have the lords' decret annulled and Sinclair's infeftment renewed.<sup>160</sup> Galbraith produced a written argument backing his summons but he refused Leslie's request to give him a copy, nor would he allow the reasons to be recorded in the books of council.<sup>161</sup> In response Leslie, his client having refused to submit the matter to arbitration, argued that Gordon was infeft in the lands before Sinclair received his infeftment, a matter which he was required to prove. The interesting thing about Galbraith's activity in this case is that James Gordon of Lochinver was a major client of his in Kirkcudbright. Acting for Sinclair does not appear to have upset his relationship with Gordon, since he acted for him both the year before and the year after this case. Evidently, Sinclair was successful since in 1529 he resigned most of his interest in the lands and they were granted by the king to Robert, Lord Maxwell and became part of his barony of Caerlaverock.<sup>162</sup>

Tenurial links might of course lead to the development of family links. Galbraith's client Peter Carmichael of Dron provides an example. The Carmichaels were major Angus vassals in the lordship of Douglas and owed their standing in the world to the Douglasses.<sup>163</sup> Peter Carmichael, the half-brother of the fifth earl of Angus, had

<sup>159</sup> *R.M.S.*, iii, 131: 28 February, 1517; *R.S.S.*, I, no. 2707: 14 February, 1516.

<sup>160</sup> *C.S.* 5/37 fol. 49r: 26 March, 1527.

<sup>161</sup> *C.S.* 5/37 fols. 64v, 72r-v: 29 March, 1 April, 1527.

<sup>162</sup> *R.M.S.*, ii, no. 841: 29 September, 1529.

<sup>163</sup> Kelley, *Douglas Earls of Angus*, 163.



exchanged his lands in the lordship for lands in the regality of Abernethy of which he became bailie on behalf of the earl.<sup>164</sup> Galbraith appeared on Angus' behalf together with Carmichael, probably as his bailie, in 1518.<sup>165</sup> The previous year Galbraith had acted for Carmichael in his own right against James Fenton, Chanter of Dunkeld, in an action concerning a lease.<sup>166</sup>

Family and political connections might repel clients as easily as they attracted them. Leslie's client Ninian Chernside of East Nesbit, would never have dreamed of employing Robert Galbraith to act for him against Lord Home in 1524. This was not merely because Galbraith had traditional links with the Homes, but because Chirnside was one of those responsible for the murder of David Home, Prior of Coldingham, in the winter of 1517.<sup>167</sup> Similarly, Galbraith acted as curator to the heiresses of Blackadder because Home of Wedderburn had strongly asserted his claims to their wardship and marriage and had by 1516 seized Blackadder castle. Patrick Blackadder of Tulliallan claimed to have a royal gift of these lands, but family loyalty determined which side Galbraith should take. Margaret and Beatrice, the heiresses of Robert Blackadder (who had died at Flodden), were the daughters of Angus' sister, Alison Douglas. Her marriage to David Home of Wedderburn involved Galbraith in the legal aspects of a feud that was to last for a decade.<sup>168</sup>

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<sup>164</sup> Kelley, *Douglas Earls of Angus*, 145, 165; Fraser, *Douglas*, 187-90.

<sup>165</sup> C.S. 5/32 fol. 47v: 6 December, 1518.

<sup>166</sup> C.S. 5/30 fol. 135v: 7 August, 1517.

<sup>167</sup> Emond, *Minority of James V*, 173.

<sup>168</sup> On the Home/Blackadder feud, see Kelley, *Douglas Earls of Angus*, 289-292.

It was not the only such matter in which he found himself involved. On the west March, in the serious feud which developed between (or, rather, was inherited by) James Douglas of Drumlanrig and Robert Crichton of Sanquhar, Galbraith represented Douglas. Crichton, as sheriff of Dumfries, allegedly tried to arrest James who claimed that his father, and all of his kin and servants, had been exempted from the jurisdiction of Crichton's father when he was sheriff because of feud. Galbraith successfully argued Douglas' case before the lords who confirmed the exemption and named sheriff deputes to hear all actions concerning Douglas, his tenants and household, within the shire of Dumfries.<sup>169</sup> A year later Douglas brought another action against Crichton of Sanquhar, on behalf of Thomas Ferguson of Craigdarach, his 'kynsman servant and part takar', whose father had been killed during the feud with the Crichtons, and successfully asserted Ferguson's right to exemption from all courts held by Crichton.<sup>170</sup> Douglas and Ferguson again used Galbraith as procurator. Ferguson was involved in further litigation late in 1518 and early the following year against Margaret Moncrieff, widow of Laurence Crichton of Rossy, and Robert Crichton of Sanquhar and, again, he used Galbraith.<sup>171</sup> But feuding and local disturbances were part of the political background of the minority. In resuming his relationship with Sir Hugh Campbell of Loudoun, the man responsible for killing Gilbert, second Earl of Cassillis, in August 1527, Galbraith would probably have had to accept the antipathy of the Kennedies, and after the date of the killing they do not

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<sup>169</sup> C.S. 5/29 fol. 12r: 17 February, 1517.

<sup>170</sup> C.S. 5/31 fol. 128r: 19 July, 1518. In 1516 Ninian Crichton received a remission for the forethocht felony of Robert and Alexander Ferguson: *R.S.S.*, i, no. 2703: 8 February, 1516. If this Ninian, described as brother of the late Robert Crichton of Kirkpatrick, was Ninian Crichton of Bellibocht then he was a client of Robert Leslie.

<sup>171</sup> C.S. 5/32 fols. 39r, 144r, 165r.

feature as his clients.<sup>172</sup> Campbell, on the other hand, was a client of his early in 1527 and again in the early 1530s once Angus, Glencairn's nephew, was (from Galbraith's perspective) safely out of the way and Campbell enjoyed royal favour. Campbell's initial relationship with Galbraith may have come about because of the fact that he was bailie for the abbot of Melrose in the lands of Kylesmuir in Ayrshire and Galbraith had in the past acted for the abbey.<sup>173</sup> More directly, Campbell of Loudoun was the nephew of another of Galbraith's clients, James Wallace of Cragy, through James' sister Isobel.<sup>174</sup>

## ii) *Kin relationships*

There are several instances of Galbraith's clients belonging to one surname. The most direct examples concern fathers and sons, such as William, Earl Marischall, and his eldest son and heir Gilbert Keith of Troup, or Sir Gavin Kennedy of Blairquhan and his successor James.<sup>175</sup> Galbraith also appeared for John Lockhart of Barr and his daughter Margaret in separate actions.<sup>176</sup> He also acted for siblings. The Sinclair family alone provides two examples of this: the brothers Sir John Sinclair of Dryden and Patrick Sinclair of Spott and, in the main line, Elizabeth Sinclair, daughter of Henry Lord Sinclair, and her brother William.<sup>177</sup> Robert Gordon of the Glen and

<sup>172</sup> Earlier in 1527 Galbraith had acted for James Kennedy of Blairquhan, a man who certainly claimed kinship with the earl: C.S. 5/37 fol. 82r: 4 April, 1527. Campbell was put to the horn on 6 October: C.S. 5/37 fol. 241r.

<sup>173</sup> Sanderson, *Ayrshire and the Reformation*, 18.

<sup>174</sup> *Scots Peerage*, v, 494. Galbraith's father witnessed a discharge by Wallace to David Home of Wedderburn on 18 October, 1498: *HMC*, Milne-Home, 29.

<sup>175</sup> *R.S.S.*, I, no. 3265; C.S. 5/35 fol. 81v (William, Earl Marischall); C.S. 5/38 fol. 113r (Gilbert Keith); C.S. 5/28 fol. 211v (Sir Gavin Kennedy); C.S. 5/37 fol. 82r (James Kennedy).

<sup>176</sup> C.S. 5/37 fol. 67r: 30 March, 1527, (John Lockhart v Poor tenants of Galston); C.S. 5/36 116v: 3 December, 1526, (Margaret Lockhart v John Campbell).

<sup>177</sup> That the Sinclairs were brothers is clear from Patrick being described as John's brother in 1516: C.S. 5/27 fol. 172r: 12 February, 1516.

James Gordon of Lochinvar were also brothers, their father being John Gordon of Lochinvar, while Alexander Elphinstone, Canon of Aberdeen, was the brother and heir of tailzie of Andrew Elphinstone of Selmes.<sup>178</sup>

But a kin relationship did not necessarily mean political agreement or a harmonious personal relationship. In 1516 Galbraith acted for John Somerville of Cambusnethan. This is his only recorded appearance for a man who in 1520 was to take a significant role, along with David Home of Wedderburn and others, in the ‘Cleanse the Causeway’ affair in Edinburgh for which he was duly forfeited. Although Cambusnethan was a strong Angus adherent, Galbraith did not act for him again. Even in August 1525 when, with Angus in control of government, Cambusnethan sought to have his forfeiture reversed in Parliament, Galbraith did not appear on his behalf.<sup>179</sup> The next occasion on which Galbraith did come into contact with Cambusnethan was when he acted on behalf of the latter’s kinsman, Hugh, Lord Somerville, against him. Somerville had signed the ‘great aith’ of November, 1528, against Angus and was clearly inimical to Cambusnethan. In December, 1528, Somerville brought an action against Cambusnethan for the sum of 957 merks allegedly owing to him. Moreover, he alleged that he had lawfully redeemed certain lands in Carnwath, a claim which Cambusnethan disputed through his forespeaker, James Foulis. In pursuance of the sum allegedly owed, Somerville sought to have all Cambusnethan’s lands appraised before the sheriff deutes of Lanark, whom Cambusnethan alleged would not be impartial; he also argued that he would be risking his life in going to Lanark and

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<sup>178</sup> C.S. 5/27 fol. 217v: 6 March, 1516: Robert Gordon as procurator for John his father; C.S. 5/40 fol. 135r: 5 November, 1529.

<sup>179</sup> A.P.S., ii, 298: 3 August, 1525; C.S. 5/38 fol. 187v: 6 November, 1528; Emond, *Minority of James V*, 261-2.

asked that the matter be decided in the Tolbooth of Edinburgh with some of the lords of session present.<sup>180</sup> Despite their kinship, the argument between Somerville and Cambusnethan was a fierce one.<sup>181</sup> It is possible that his failure to act for Cambusnethan indicates that Galbraith had disregarded his natural political allegiance to the Douglasses and Homes in favour of Somerville who was close to the king.<sup>182</sup> This may reflect the *realpolitik* of a situation in which Galbraith benefitted from the fall of Angus because of his relationship with Margaret Tudor, and, having recently been given a position in the chapel royal, he may have been expecting future royal patronage. The Somervilles provide a useful reminder of something that must have been obvious to Galbraith: that political considerations, particularly during a minority, could occasionally outweigh the traditional bonds of family relationships.

In terms of affinity, the most striking example of the effect of marriage on Galbraith's client list concerns the sisters of the earl of Angus all four of whom were married to men who became clients of his. Elizabeth Douglas was married to John, Lord Hay of Yester, Alison to David Home of Wedderburn, Margaret to Sir James Douglas of Drumlanrig and Janet to John, Lord Glamis.<sup>183</sup> Home and Douglas were clear Angus adherents; Hay and Lord Gray were figures for whom Galbraith first acted in 1527 and 1528 respectively. The marriage link was not in all cases coincidental. Galbraith was already close to Home of Wedderburn although in respect of Douglas of

<sup>180</sup> C.S. 5/39 fol. 33v: 12 December, 1528. See also Cameron, *Personal Reign*, 187-8.

<sup>181</sup> Somerville appears to have operated something of a vendetta against Cambusnethan in his barony court of Carnwath: *Carnwath Court Bk.*, 124, 143, 144, 160, 164, 194, 205, 207-8; *Selected Cases from Acta Dominorum Concillii et Sessionis*, Stair Society vol. 14, 58-9.

<sup>182</sup> In December 1528 Angus was leaving for exile and his return during Galbraith's lifetime must have seemed unlikely although in fact he did return the year before Galbraith died. On Galbraith's relationship with Angus, see below.

<sup>183</sup> *Scots Peerage*, I, 189-90.

Drumlanrig and Gray the Angus connection may have opened doors. But Lord Hay only became a client during the personal reign of James V when Angus was a fugitive and only after he had come into contact with Galbraith in the arbitration involving the prioress of Haddington which was mentioned earlier.

It was possibly as a result of marriage that Robert Galbraith came to represent Elizabeth Swinton, the erstwhile prioress of Elcho, against Robert Leslie's sister in the litigation mentioned in the previous part of this chapter. Like the Galbraiths, the Swintons were very close to the Homes of Wedderburn. When Sir John Swinton (d. 1493) was a child, William de Wedderburn was his *scutifer* (esquire).<sup>184</sup> His grandson, also named John (d. 1521), was married to Katherine Lauder, one of the Lauders of Bass. In 1518 John's son married Margaret, daughter of David Home of Wedderburn, thus strengthening further the link between the two families at what was certainly a difficult time for the Homes. Elizabeth Swinton was the great-aunt of David Home's son in law. To this tenuous link can be added the fact that Galbraith's father held lands in the barony of Coldingham, Berwickshire, of which John Swinton of that Ilk was the superior.<sup>185</sup> Moreover in 1519 Robert and his brother Simon were witnesses to a letter of reversion made by their father in favour of John Swinton concerning these lands.<sup>186</sup> Galbraith certainly acted for Robert Lauder of the Bass whose family, already linked to the Swintons, became even closer to them by the marriage of his daughter to her cousin Sir John Swinton, the son of John and Margaret Home. Moreover, Lauder of the Bass was close to David Home of Wedderburn, and, during Angus' ascendancy in

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<sup>184</sup> Douglas, *Baronage*, 127.

<sup>185</sup> (S.R.O.) G.D. 11/73 (Bruce of Kennet): 2 July, 1508.

<sup>186</sup> (S.R.O.) G.D. 11/88 (Bruce of Kennet): 15 April, 1519.

1526, he received a respite for having assisted him during Albany's governorship.<sup>187</sup>

In 1532 Eufame Leslie appears to have bought off Swinton's interest in the Elcho matter by granting him a letter of tack, and giving him a discharge in respect of all past debts.<sup>188</sup>

Galbraith's small group of four clients identified in the sheriffdom of Renfrew can be explained on the basis of affinity by marriage alone. The main line of the Sempill family descended after the death of John, Lord Sempill, at Flodden to his eldest son William. William's younger brother, Gabriel Sempill of Cathcart, married Janet, the daughter of John Spreule of Coldon (or Cowdin), also in Renfrewshire.<sup>189</sup> Galbraith acted for John Spreule in 1524, and for William, Lord Sempill, in 1526. In 1517 Galbraith had acted against the latter in a dispute with Margaret Crichton, Lady Sempill. Presumably Margaret was William's step-mother.<sup>190</sup> It seems that William's father, prior to Flodden, had given him a box of money and jewellery which Margaret possessed but refused to hand over. Margaret obtained letters of cursing against William, and alleged that he was being obstructive and prevented her land from being worked.<sup>191</sup> His fourth identified Renfrewshire client was Ninian, third Lord Ross. In 1523, Ninian married Elizabeth, sister of William, Master of Ruthven who can be linked to Galbraith from 1519.<sup>192</sup>

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<sup>187</sup> R.S.S., I, 3404: 28 June, 1526.

<sup>188</sup> G.D. 12/108 (Swinton Charters): 8 July, 1532; G.D. 12/109: 31 July, 1532.

<sup>189</sup> Douglas, *Baronage*, 467.

<sup>190</sup> According to Douglas (*Baronage*, 467), followed by the *Scots Peerage* (vol. vii), John, first Lord Sempill was married to Margaret Colville, daughter of Robert Colville of Ochiltree. Margaret Crichton is not mentioned but entries in the *acta* suggest she was John's second wife.

<sup>191</sup> C.S. 5/29 fol. 151r: 26 March, 1517; C.S. 5/31 fol. 33v: 22 June, 1518. On both occasions William was personally present and there is no indication of a forespeaker acting for him.

<sup>192</sup> *Scots Peerage*, vii, 252; C.S. 5/32 fol. 142v: 17 March, 1519.



A relationship through marriage was no guarantee that a dispute between members of two kindreds would not go to law. For example, in 1517 David Home of Wedderburn brought an action against Sir Ninian Seton of Tullibody, one of Robert Leslie's Perthshire clients.<sup>193</sup> Seton, through his mother, was the grandson of Alexander, Lord Home. But a family connection had the potential to cause a conflict of interest and it could destroy as well as create a link between a lawyer and client. Galbraith's relationship with Sir William Sinclair of Hirdmanston has already been described. In 1531 Sinclair died naming Galbraith in his last testament as tutor to his two daughters Margaret and Elizabeth. Nine months later Sinclair's widow, Beatrice Raiton, and her new husband William Crichton of Drylaw, removed these children from the convent at Haddington where they were being educated at Galbraith's expense (although Galbraith would have more than recouped his expenditure from the wardship of their lands granted to him by the king).<sup>194</sup> Galbraith brought an action to have the girls returned and their mother was prompt in complying with the lords' decret ordering their deliverance.<sup>195</sup> The interesting aspect of the case in the present context is that William Crichton was a relative of George Crichton, Bishop of Dunkeld. In 1527, when George had not long been in office, Galbraith acted for him against John Campbell of Lundy.<sup>196</sup> Now George stood against him at the bar with the laird of Drylaw and his wife, Lady Hirdmanston. Galbraith therefore stated that as he was the pensioner of the bishop, and had 'maid his band to him', it was incumbent upon him to discharge the bishop from this obligation since they stood opposed to each other. In

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<sup>193</sup> C.S. 5/30 fol. 119

<sup>194</sup> The Prioress of Haddington was one of Galbraith's clients and the convent was situated not far from where he held his major lands.

<sup>195</sup> C.S. 5/43 fols. 66r-66v; 82v: 9 and 18 November, 1531.

<sup>196</sup> C.S. 5/37 fol. 158r: 13 July, 1527.

response the bishop discharged Galbraith from any obligation entered into towards him under the bond. The terms of the obligation were not stated. Certainly Galbraith, since the summons in the case ran in his name as principal, was acting directly against the bishop and his kinsman and no bond then in existence would have countenanced the bringing of such a direct personal action. It is a moot point whether it would still have been necessary to discharge the bond had Galbraith merely been acting as a procurator and if someone else had been the children's tutor. Although in 1519 he acted for William Ruthven against Gavin Douglas, the previous bishop, he never acted against George Crichton and so there is no way of telling for certain whether their agreement entirely precluded him from doing so. As was shown in chapter two, it appears that men of law normally reserved the right in bonds that they made to act for those to whom they had previously become bound. Whatever the precise nature of the restraint under which he had placed himself in relation to the bishop of Dunkeld, once the bond was discharged it disappeared together, no doubt, with his pension. Galbraith never again appeared for the bishop and this case stands out as an example of a lawyer-client relationship which broke down because of a conflict of interest.

### iii) *Consensual relationships*

Mention has already been made of the bonds entered into by Lord Maxwell with other clients of Galbraith. In terms of relationships moulded by service, that of Peter Carmichael of Dron and the sixth earl of Angus could be so described, although there were also family and tenorial links between them. The same is true of Angus and Somerville of Cambusnethan. Galbraith was also witness to a bond of manrent given

in November 1526 by Leslie's client, Ninian Crichton of Bellibocht, to his own client, James Douglas of Drumlanrig.<sup>197</sup> Ninian promised to support Douglas, excepting his allegiance to Lord Crichton of Sanquhar although promising not to support Crichton if he wrongfully molested Douglas. This was in the context of a local feud. On a national scale, Galbraith's principal client, Margaret Tudor, was so involved in the politics of the period between 1513 and 1528, and wavered so much in her friendships and alliances, that anyone directly connected to her must have found it difficult to adopt a consistent position. Certainly Galbraith can be linked to the Homes who gave her support against Albany. But the political complexity is such that no attempt can be made here to assess the impact on Galbraith's career of the political ups and downs of the Queen Dowager. The fact that Albany could probably rely on the support of the earls of Crawford and Erroll and Lords Glamis and Saltoun in 1516, all of whom were clients of Galbraith during different political circumstances later in his career, shows how difficult it would be to find in his client list evidence of a party that was consistently 'pro-Margaret' (over a period during which Margaret herself was at some points 'pro-Albany') and to describe the results concisely.<sup>198</sup>

Moreover, there is less evidence of bonds entered into by some of the earls for whom Galbraith acted (notably, Buchan, Erroll and Sutherland). This makes it more difficult to trace their supporters and part-takers. One example of (presumably consensual) conduct occurred when two of Galbraith's clients, James Douglas of Drumlanrig and James Gordon of Lochinver, co-operate in the murder of Thomas MacLellan of

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<sup>197</sup> (S.R.O.) A.D. 1/91: 24 November, 1526; Wormald, *Lords and Men*, 261.

<sup>198</sup> Emond, *Minority of James V*, 105.

Bombie in Edinburgh in 1526.<sup>199</sup> The killing occurred in the context of a dispute, in which Galbraith was active, concerning James' mother who had married MacLellan after her first husband's death.

### **Part Three: Conclusion**

As men of law Robert Leslie and Robert Galbraith had much in common and essentially their careers developed along similar paths. Using local contacts initially, each built up a considerable number of clients. The income which this brought in was lent at interest or used to purchase land, Leslie obtaining lands in Perthshire and Galbraith in Haddington and Berwickshire. Both rose from relatively modest origins to mix with important figures and to hold offices in royal service. A similar picture applies equally to many of their contemporaries with whom they interacted and with whom, as with each other, they competed and co-operated as circumstances demanded. During the period January 1517 to January 1536 Leslie and Galbraith were recorded confronting each other before the lords sixty-two times in forty-two different cases.<sup>200</sup> These sixty-two appearances were spread over sixty separate days although this is the absolute minimum based on a record which, besides being incomplete, was not maintained with the intention of recording their appearances.

In terms of constitutions of procurators, Galbraith was constituted 266 times, whereas Leslie was named as a procurator on 242 occasions. Both were named together as procurators, either the pair of them alone or along with others, on 131 occasions. In

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<sup>199</sup> *Scots Peerage*, v, 261; C.S. 5/36 fol. 18r; C.S. 5/38 fols. 171v; 173r.

<sup>200</sup> Appendix 11.

theory, these constitutions might, but need not, result in either Leslie or Galbraith acting for the party making the constitution. They need not indicate close co-operation between them. Yet it would be surprising if such co-operation did not exist, at least in some cases. After all these two advocates between them shared a considerable proportion of the court business of their generation. So, for instance, where one of Leslie's clients called upon one of Galbraith's to act as warrantor, it is likely that the two advocates would co-operate in finding the best approach to defend the matter in question. Galbraith can be found working in conjunction with Thomas Hamilton and Thomas Kincaigie as well as, on one occasion, with Leslie when they were both named as procurators for Ninian, Lord Ross.<sup>201</sup> They also co-operated as arbiters on several occasions. But there were cases where co-operation was less than might have been expected. An example occurred when Galbraith's client, Margaret Tudor, was called upon by Leslie's client, David Learmonth, Provost of St Andrews, to warrant him in the lands of Balgony in Fife which were claimed by James Lundie. Learmonth's title was based upon a lease granted by Margaret in 1513 when she was tutor to James V.<sup>202</sup> Lundie's allegation was that the lease, purporting to last for thirteen years, was invalid because it was alleged that Margaret lacked the power to set lands beyond the term of her office. Beyond this *ultra vires* argument, it was also alleged that the queen granted the lease in her own name, instead of the king's, and did so under her signet.<sup>203</sup> Leslie's attack on Lundie's title to sue fell flat when Lundie produced his own lease, dated February, 1516, and given by Albany under the privy

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<sup>201</sup> C.S. 5/37 fol. 62v (Kincaigie): 29 March, 1527; C.S. 5/43 fol. 74v (Hamilton): 15 November, 1531; C.S. 5/41 fol. 71v: 7 April, 1530.

<sup>202</sup> C.S. 5/33 fol. 28v: 20 November, 1522.

<sup>203</sup> C.S. 5/33 fol. 96r: 15 December, 1522.

seal.<sup>204</sup> In the face of what appears to have been a lack of co-operation from Galbraith, Learmonth then had to raise an action against the queen relying on the warrandice clause of his lease.

Clients

Dividing Scotland (albeit rather unevenly) into four quarters, and matching this division to the client lists of both Leslie and Galbraith, produces predictably different results (see **Figure 6.4**).

Leslie:	Galbraith:
North east <sup>205</sup> : 148 (56.5%)	North east: 73 (34.0%)
North west <sup>206</sup> : 5 ( 1.9%)	North west: 8 ( 3.7%)
South east <sup>207</sup> : 50 (19.1%)	South east: 66 (30.7%)
South west <sup>208</sup> : 57 (21.7%)	South west: 60 (27.9%)
Foreign <sup>209</sup> : 2 ( 0.8%)	Foreign: 8 ( 3.7%)
Total: 262.	Total: 215.

Figure 6.4

As a source of clients the north-west is negligible. More than half of Leslie’s clients came from his own area, the north-east. In Galbraith’s case, almost a third were from the south east although the Borders produced far fewer litigants than Fife and Perthshire. Both show a clear east coast bias but, again, this can be explained simply

<sup>204</sup> C.S. 5/33 fol. 94v: 15 December, 1522.  
<sup>205</sup> Sheriffdoms of Aberdeen, Banff, Clackmannan, Elgin, Fife, Forfar, Forres, Nairn, Perth, Kincardine, Kinross, Regalities of Arbroath, Dunfermline and St Andrews.; burgh of Dundee.  
<sup>206</sup> Sheriffdoms of Argyll (including the Isles) and Inverness.  
<sup>207</sup> Sheriffdoms of Stirling, Edinburgh, Haddington, Linlithgow, Peebles, Lauderdale, Berwick, Roxburgh; port of Leith.  
<sup>208</sup> Sheriffdoms of Ayr, Dumfries, Dumbarton, Renfrew, Galloway, Kirkcudbright, Wigtown; bailiary of Cunningham.  
<sup>209</sup> From France, England, Denmark and Flanders.

on the basis of demographics. In terms of foreign litigants, Leslie attracted only two: a merchant from Avignon and the master of a ship from Dieppe. Galbraith had eight clients who were resident abroad although three of them, Master Alexander Fotheringham, chaplain of St Ninian's church in Bruges, John Moffat, conservator in Flanders, and Marion Frog (living in England), were Scots. Of the rest, two were French merchants, one was an Englishman, one was a servant to the king of Denmark, and one is unidentified. To add to the international flavour, both the Frenchmen (one of whom, Guillaume Besselaw, was the factor of a Piedmontese merchant) were in dispute with other Frenchmen and the Dane was involved in an action with Hans Grail, a 'ducheman' (who may therefore have been Dutch or German). Most of the cases involving these litigants were straightforward debt actions or involved *spuilzie* of ships. There is no indication that Galbraith was able to benefit particularly from contacts he might have made whilst living in France nor can it be said that he or Leslie specialised in cases involving foreigners since such cases were fairly common and various procurators were involved in them. The most that can be said is that both Leslie and Galbraith must have been at least competent exponents of the sea laws to have agreed to act in cases involving shipping.

### **Attendance**

Numerous factors affected the amount of time the lords would sit in any given year and might also affect in which parts of the year the court sat. Internal political upheaval, particularly during the minority, and bouts of plague were the major factors. On average, taking the surviving record for the period 25 March 1515 to 24 March



1536, the court sat on only one hundred days of the year and it is impossible to prove that any particular advocate was in attendance for more than a fraction of this time. On average, Leslie was mentioned as present on 26.4 days per year, while Galbraith's presence can only be proven on 23.2 days.<sup>210</sup> The high points of attendance for both Leslie and Galbraith came in 1528, the year of James V's escape from the custody of Angus. In that year Leslie was named as appearing before the lords on fifty-one days, and Galbraith on sixty-five days (out of a possible ninety-two). This year was something of a crossover point. Before and during 1528, Galbraith was more regularly in attendance than Leslie. Afterwards, however, Leslie begins to appear more often than Galbraith. This was probably due to Galbraith becoming treasurer of the chapel royal in that year. It is essential to remember that these figures are only approximate and represent the minimum number of possible appearances. This is due to the fact that the clerks of council did not bother to record the attendance of forespeakers when the parties themselves were present unless the forespeaker in question specifically did something that it was necessary to record.

Moreover, the factors which affected the number of days on which the lords met could affect the attendance of particular advocates to an even greater degree. The lords sat in Edinburgh primarily because of its importance as the centre of government and finance within the realm. But if Edinburgh became unsuitable, due to war or plague, they were better able to move elsewhere than the advocates who practised before them. For example, in the autumn of 1529 there was a serious outbreak of plague in Edinburgh. A proclamation was issued punishing with death anyone dwelling in Fife

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<sup>210</sup> See Appendix 10 which should be consulted for all figures given in this paragraph.

who repaired south of the Forth. This placed an advocate like Leslie, with his numerous Fife clients, in a difficult position. In one case, he claimed that evidence belonging to his client, the laird of Ardross, was lying in Fife and could not be brought to Edinburgh for his defence.<sup>211</sup> From 7 April to 10 November 1530 there is no sign of him appearing before the lords. During that time the session was itinerant, meeting in Stirling on 22 April and for several days in May and a day in June; then in Edinburgh briefly on 1 July before moving south to Peebles. By 19 July the lords of the exchequer were sitting in Linlithgow where they remained until September. Having convened again at Peebles on 11 September, the lords ordered the session to convene in Edinburgh if it was free of the plague, otherwise to meet in Linlithgow. Circumstances must have necessitated a change because on 8 and 10 October the lords of session met in Dundee and, at the end of the month, in Stirling. On 7 November they were in Perth. It was not until 10 November that Leslie made an appearance, acting in two cases, one for Paul Dishington of Ardross and the other for George, Earl of Rothes. If the record is accurate, then in total he had missed forty days for which a *sederunt* was recorded. Nor was he unique. Adam Otterburn, as provost of Edinburgh, remained in the burgh during this period to carry out the functions of his office.<sup>212</sup> Robert Galbraith, apart from one appearance at Stirling in May 1530, did not appear again until February 1531. Galbraith was certainly in Edinburgh in September and December 1530.

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<sup>211</sup> C.S. 5/40 fol. 134r: 5 November, 1529.

<sup>212</sup> Inglis, *Otterburn*, 42.

In more normal times, there is much room to speculate on how advocates occupied themselves when the lords were not in session. There were, of course, other courts before which they might plead. Galbraith appeared in Berwick sheriff court (which routinely sat in the tolbooth of Edinburgh), and Leslie can be found, albeit rarely, in Fife sheriff court and in Dunfermline regality court. The court books of the latter two survive during part of his career and they reveal that Leslie did not act regularly in those courts although once again there is no way of saying how often he was in attendance. There is evidence that both Galbraith and Leslie were notaries public. The protocol books of neither have survived, and in Leslie's case the evidence for his status as a notary is limited to one reference. This document, mentioned in Dunfermline Regality court book, was drawn up by Robert Leslie 'notar of Aberdeyne dioces'. It might have been expected, if this was Robert Leslie the man of law, that he would have been a notary of St Andrews diocese. Nonetheless the document was an assignation made in Fife of the lands of Melgun by Patrick Wemyss of Pittencreiff to Master Thomas Wemyss and Leslie, complete with the designation 'of Innerpafray', later acted as an arbiter in a dispute concerning the same land between Thomas Wemyss and Andrew Wood of Largo.<sup>213</sup> This is not conclusive evidence that the arbiter and the notary were the same man and, indeed, one document is slim evidence of a notarial career. It is perhaps best left an open question whether Robert Leslie the advocate was also a notary until further evidence can be found. In Galbraith's case, the evidence of his status as a notary also consists of a single document so far discovered, an instrument of sasine dating from 1529 which bears to have been drawn

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<sup>213</sup> *Dunfermline Regality Ct. Bk.*, 121.

up by him and contains his elaborate notarial mark.<sup>214</sup> It narrates a ceremony of sasine in the hands of himself and Simon Fortune, his nephew, another notary, by Isobel Hoppringle, Prioress of Coldstream, of lands near the convent held by the Queen Dowager in liferent. The circumstances are entirely consistent with the notary, who describes himself as '*artium magister clericus Sanctiandrois diocesis publicus sacra apostolica*', being Robert Galbraith the advocate.

### Arbitration

Leslie was involved as an arbiter in at least eight arbitrations all of which belonged to the second half of his career while Galbraith was involved in at least eleven over a longer period. In three arbitrations both were involved. Such activity was by no means unusual since men of law were often selected as arbiters generally because of their learning and impartiality. In one of the arbitrations involving both Leslie and Galbraith, the arbiters were chosen by the lords - rather than the parties - specifically on the basis that they were 'neutrale and discrete men'.<sup>215</sup>

Sometimes the parties agreed to submit their dispute to the lords as a body who would decide the matter as arbiters. In one case, a client of Galbraith's agreed to this mode of resolution 'for stanching of pley and to leif in rest & quiete in tyme tocum' even though he believed his case was just and good in law.<sup>216</sup> More often, the parties themselves selected the men who were to act as arbiters and, as well as leading churchmen and lords of session, they selected professional advocates. From the point

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<sup>214</sup> (S.R.O.) R.H. 6/1039: 22 April, 1529.

<sup>215</sup> C.S. 5/42 fol. 123r: 17 March, 1531.

<sup>216</sup> C.S. 5/37 fol. 64v: 29 March, 1527.

of view of men such as Leslie and Galbraith, it was often the case that a party who selected them to act as an arbiter already had a pre-existing relationship with them as one of their clients. For example, Ninian, Lord Ross, was an established client of Leslie's who then selected him as one of the arbiters in a dispute with Adam Quhitfurd.<sup>217</sup> The same thing happened in relation to both Leslie and Galbraith in a dispute which came before the lords in June, 1526. The matter concerned spuilzie by George, Lord Seton, which was alleged by Alexander, Lord Elphinstone. As so often, spuilzie appears to have been merely the tip of a deeper dispute. Leslie appeared for Seton, and Galbraith for Elphinstone.<sup>218</sup> The matter was eventually submitted to arbitration, and the 'compromise' or submission, dated 5 December, was registered in the books of council two days later.<sup>219</sup> For the arbiters on his side, Seton selected Master John Campbell of Lundy, Robert Leslie and Richard Maitland of Lethington, or any two of them; Elphinstone selected the treasurer, Archibald Douglas, Master James Lawson, and Robert Galbraith, or any two of them. There were two 'overmen & odmen', George Douglas, brother of the earl of Angus, and Sir William Cunningham, fiar of Glencairn. The degree of impartiality expected of either Leslie or Galbraith is questionable. Their inclusion was perhaps seen as useful in helping the process of finding an accommodation between the parties since they were no doubt thoroughly versed in the affairs of their respective clients.

As well as an antecedent relationship with one of the parties to an arbitration, Leslie also appeared for parties as their procurator when their initial contact with him was in

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<sup>217</sup> C.S. 5/41 fol. 150v: 28 March, 1531; C.S. 5/41 fol. 71v: 7 April, 1530.

<sup>218</sup> C.S. 5/36 fol. 21v: 30 June, 1526.

<sup>219</sup> C.S. 5/36 fol. 127r: 7 December, 1526.

the context of an arbitration. For example, the first time he can be connected to Adam Dundas was when the latter selected him as an arbiter in a dispute with Andrew Murray concerning the escheat of Archibald Douglas in Ballincreiff, the former treasurer and, as has just been seen, erstwhile amicable compositor. The submission to arbitration was made on 26 November, 1528.<sup>220</sup> Evidently the decret arbitral, if one was made, did not end the matter because the following July Leslie was acting for Dundas against Murray who had allegedly impeded him from harvesting corn in the disputed area.<sup>221</sup> There is nothing to link Leslie with Dundas prior to the arbitration. The same phenomena can be seen in relation to Galbraith. In 1526 a dispute between Elizabeth Hepburn, Prioress of Haddington, and Lord Hay of Yester, was submitted to arbitration within a week of the matter coming before the lords.<sup>222</sup> Galbraith was Elizabeth's procurator, and it was natural that she should also select him as one of the arbiters. For his part, Lord Hay selected the man who had been acting for him as forespeaker, Henry Spittall, as one of his two arbiters.<sup>223</sup> Uniquely, the day before the submission to arbitration Galbraith made a protest 'in naime of the prioires of hadington but nocht as procuratour'. The meaning of this is not clear; but it is unlikely that he was attempting to distance himself from her with an amicable process of arbitration in prospect.

Unusually, both Leslie and Galbraith simultaneously acted for Ninian, Lord Ross, who claimed the lands of Argarth, which had been in ward due to the death of the earl

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<sup>220</sup> C.S. 5/39 fol. 7v.

<sup>221</sup> C.S. 5/40 fol. 62r: 16 July, 1529.

<sup>222</sup> The case appeared twice, on 1 and 7 March: C.S. 5/35 fols. 211v, 219r. The action concerned a summons of error relating to a perambulation of certain lands the boundaries of which were in dispute.

<sup>223</sup> *Yester Writs*, no. 424: 8 March, 1526.

of Erroll, against Alexander Lyon who alleged that he had been gifted the wardship of the lands in question. (As an aside, matters returned to a more familiar pattern in a later case recorded on that day, a dispute over a payment due under a marriage contract, when Leslie acted for the pursuer and Galbraith for the defender.)<sup>224</sup> Thereafter, when Lord Ross was involved in an arbitration with Adam Quhitfurd, between them they selected three procurators: Galbraith, Leslie and Robert Reid, Abbot of Kinloss and lord of session.<sup>225</sup> Of course, some of the arbitrations in which they were involved concerned parties who were not, and did not become, clients. But generally speaking, there was often a pre-existing link between Leslie or Galbraith and one of the parties whenever they acted as arbiters.

### **Criminal cases**

It is difficult to tell whether Leslie routinely attended criminal courts. These were often held by justices deputed by the justice general, the earl of Argyll, a role which was most often filled by William Scott of Balwearie and Patrick Baron of Spittalfield.<sup>226</sup> Since they generally met in the tolbooth of Edinburgh it would not have been inconvenient for men of law to attend or to represent accused persons, although the justiciary record is not sufficiently detailed to indicate their presence. Leslie certainly had the opportunity to attend and definitely did so on three occasions when he appeared to give caution for the later appearance of persons (presumably

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<sup>224</sup> C.S. 5/41 fols. 71r-72v: 7 April, 1530.

<sup>225</sup> C.S. 5/42 fol. 150v: 28 March, 1531.

<sup>226</sup> The presiding justices recorded during this period, either as deputes of Argyll or justices *in hac parte*, were as follows: William Scott of Balwearie; Patrick Baron of Spittalfield; Archibald Douglas, Provost of Edinburgh; Sir John Stirling of Keir; Master John Campbell of Lundie; Robert Barton of Over Barnton, Treasurer; James, Earl of Moray; Patrick, Lord Gray; Andrew Auchinleck and Henry Wardlaw of Kilbarton: (S.R.O.) J.C. 1/4: 25 June, 1526 - 11 October, 1531.



clients) charged with offences.<sup>227</sup> From 25 June 1526 to 11 October 1531 justice courts sat mainly in Edinburgh but also in Linlithgow, Perth, and Stirling, on seventy six separate days under a variety of justice deputes.<sup>228</sup> On eight of those days Leslie's whereabouts are known because he was appearing before the lords of council in Edinburgh.<sup>229</sup> On each of those days the justice court was also held in the tolbooth of Edinburgh and so Leslie may have attended both courts. On a further occasion it is known that Leslie was rendering accounts in the Exchequer but, again, Patrick Baron was holding his justice court in the same place on the same day and so Leslie's attendance is not precluded.<sup>230</sup> In terms of justice ayres, once again Leslie's attendance can be neither proven nor disproved with one exception. On 11 November 1529 the justice ayre at Kirkcudbright commenced.<sup>231</sup> The very next day Leslie was in Edinburgh appearing before the lords and so he certainly did not attend the ayre. He may have attended the Perth justice ayre, which began on 22 November 1530, even though he appeared before the lords on 26 November because the lords were sitting in Perth at the time. In 1535 even though he appeared in Edinburgh on 15 November and 7 December it is possible that he attended the Dumfries justice ayre which began on 21 November. If he did, then as usual his presence went unrecorded.

As a cleric Robert Galbraith was much less likely to involve himself in criminal cases since churchmen refused to have anything to do with matters of blood and criminal

<sup>227</sup> (S.R.O.) JC1/3: Stirling, 25 October, 1526; Edinburgh, 19 July, 1527; Edinburgh, 31 November, 1528.

<sup>228</sup> This figure has been taken from the earliest justiciary court book, (S.R.O.) J.C. 1/4, by counting each day on which a justice court was recorded. The court book has no pagination.

<sup>229</sup> The dates are as follows: 7 July, 1526; 8 August, 1527; 18 December, 1527; 16 December, 1528; 23 February, 1529; 24 March, 1530; 26 January, 1531; and 1 February, 1531.

<sup>230</sup> *E.R.*, xvi, 84: 25 August, 1531.

<sup>231</sup> *R.S.S.*, ii, appendix, 766-771, gives the commencement dates of these justice ayres.

courts had authority to punish corporally and capitally. No instance of him appearing in a criminal court survives. On ten of the seventy six days when justice courts were being held, he appeared before the lords and on some of those days he did so more than once.<sup>232</sup> More definitely, he certainly could not have attended the Dumfries justice ayre which began on 19 October 1529 because the next day he was active in Edinburgh appearing before the lords of council. The following month the Kirkcudbright justice ayre began on 11 November but once more Galbraith was in Edinburgh, witnessing an indenture, the next day.<sup>233</sup> The case is similar with the Dumbarton justice ayre in October 1531 and the Perth ayre in December 1530, although in the latter case some four days elapsed between the beginning of the ayre and definite proof that Galbraith was in Edinburgh involved in a ceremony of sasine.<sup>234</sup> Nonetheless, the evidence is clearer in the case of Galbraith than it is in the case of Leslie and it strongly suggests that he did not involve himself in matters that were subject to criminal jurisdiction.

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<sup>232</sup> The dates are as follows: 7 July, 1526; 4 December, 1526; 29 July, 1527; 16 August, 1527; 23 November, 1527; 18 December, 1527; 7 September, 1528; 16 November, 1528; 23 February, 1529; and 4 March, 1529.

<sup>233</sup> *Binns Papers*, no. 32: 12 November, 1529.

<sup>234</sup> *Prot. Bk. Foular*, iii, no. 273: 9 December, 1530.

## Addendum: The Queen's Advocate

According to Balfour's *Practicks* it was not competent for women to act as procurators in court.<sup>235</sup> This however does not represent legal practice prior to the Reformation when instances can be found of women appearing on behalf of their husbands, sons and daughters. Generally speaking, in legal affairs married women were subordinated to their husbands who either personally represented them or whose consent had to be obtained to their representation by another. Unmarried women, in particular widows, did regularly appear personally in legal proceedings although from the wording of the record it is usually impossible to tell whether they used a forespeaker.

The same distinction applied to contemporary women in the royal family. The earliest references to a 'queen's advocate' occur during periods of royal minority. In January 1443 John Dishington, Laird of Ardross and one of the lords of council, was decribed as procurator for Queen Joan, the widow of James I.<sup>236</sup> During the minority of James III, in 1461, Master Gilbert Hering, '*advocato domine regine*', is recorded in the Exchequer Roll. The '*domina regina*' referred to was Mary of Guelders and Gilbert had received a payment for coming from Edinburgh to Falkland probably to proffer advice in relation to prospective litigation.<sup>237</sup> In 1508 Matthew, Earl of Lennox, acted as procurator 'for ane maist excellent maist hie & mighty princess our soverane lady', that is, Margaret Tudor, in registering a deed into which she had entered with

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<sup>235</sup> *B. P.*, ii, 298-9.

<sup>236</sup> *HMC*, 10th Report, Appendix 1, no. 9, page 63.

<sup>237</sup> *E.R.*, vii, 59. The record notes the payment was '*pro placito de Soltre*'.

Alexander Boyd of Kilmarnock before the lords of council.<sup>238</sup> But it is not until the minority of James V that a settled course of activity by one advocate on behalf of the queen mother can be identified.

Margaret Tudor was the first queen mother since the end of the minority of James III in 1469 to survive her husband and to require the independent representation and defence of her own interests in courts of law. The records for James V's minority, imperfect though they are, are much fuller than for the minority of James III. That Margaret should have come into contact with Robert Galbraith has already been explained through his connection to the Homes. Alexander, third Lord Home, was royal chamberlain during the reign of James IV and, although an opponent of Margaret as regent, by 1517 he was led to support her by his disenchantment with Albany.

But Margaret's initial use of procurators indicates that they were probably provided to her by her second husband, the earl of Angus. By her action in seeking to retain the regency following her re-marriage, Margaret had provoked a constitutional crisis and had mobilised anti-Douglas opinion against her regime. This led to her deposition on the legal ground that having 'contractit marriage and past *ad secundas nuptias*' she had lost the office of tutory over the king, and could no longer intromit with his estate.<sup>239</sup> This common law rule had never before been applied to the regency; but then the situation in which it was used had never before arisen.<sup>240</sup> Once she was no

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<sup>238</sup> C.S. 5/19 fol. 353r; 4 September, 1508.

<sup>239</sup> C.S. 5/26 fols. 165r, 168r; 18 September, 24 October, 1514.

<sup>240</sup> Kelley, *Douglas Earls of Angus*, 235; *B.P.*, i, 116.

longer tutor to the king, it is unlikely that the king's advocate could act for her. Indeed the holder of that office, James Wishart, was one of the lords of council responsible for the decret which deposed her.<sup>241</sup>

Margaret soon found her position such that she felt it necessary to take refuge in England where she remained from September 1515 to June, 1517. It was from here that she began to be represented in legal actions before the lords of council. The individuals chosen to represent her were probably selected by her husband, perhaps with the advice of her brother. On 15 September, in the presence of the governor, compeared 'hir advocatis' Master George Car and Master James Douglas.<sup>242</sup> The king's advocate was also present but presumably acting for the king's interest. The supplication which was presented on her behalf was of a tenor that was to become extremely familiar over the next two decades, reflecting the state of her personal finances, and the difficulties she faced in collecting rents due to her from lands granted to her in conjunct infeftment by James IV.<sup>243</sup> Complaining that the wardship of Balquhiddar had been disposed by the treasurer to someone else, when she claimed that it properly belonged to her, Margaret reminded the lords that it was part of a lordship granted to her by the late king together with all its 'fredomes & commoditites'. A year later Margaret was represented by three Englishmen, Sir William Husband, John (or William) Simson and Thomas Banerlaw who took delivery of jewels, which she had left at Tantallon during her flight from Scotland,

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<sup>241</sup> For Wishart, see chapter seven where it is suggested that he may have been given the post of king's advocate through Margaret's influence.

<sup>242</sup> C.S. 5/27 fol. 70r: 15 September, 1515. James Douglas later acted as Angus' procurator: C.S. 5/30 fols. 22v, 194v.

<sup>243</sup> In her own correspondence Margaret recounted her financial difficulties in detail: Patricia Buchanan, *Margaret Tudor Queen Of Scots*, (Edinburgh, 1985), 157-8.

conform to an agreement between Scottish and English ambassadors.<sup>244</sup> An inventory of the jewels appears, somewhat incongruously, in the *acta*. Later in the month Margaret was pursuing an action against parties she alleged were intromitting with her lordship of Methven.<sup>245</sup> It was soon after this that the first legal manifestation of the strain between Margaret and her second husband appeared. Angus, now returned to Scotland and reconciled to Albany, expressly denied an allegation by Margaret's English procurators that he had had assigned to her all the lands and lordships that had been granted to her in conjunct infeftment and dowry within Scotland.<sup>246</sup> By the time Margaret returned to Scotland, on 15 June, 1517, the breach with her husband which would eventually lead to divorce had appeared. It is unlikely therefore that Galbraith was his choice. On 26 June he appeared as her advocate for the first time, a position he was to retain for over twenty years.

The litigation involving Margaret Tudor has already been the subject of brief scholarly comment in the context of her political life and there is no need to go over the same ground.<sup>247</sup> Her relationship with her advocate Galbraith had no political aspect and for that reason has received virtually no comment. Although Angus, at her insistence, renounced his rights to run Margaret's estates in 1517, under the law as her husband his consent to any summons which she raised was a necessity and, as was shown above, he denied making any renunciation of his rights. Kelley has argued that from her perspective she considered this to be a mere formality. Nonetheless Galbraith was involved in a tripartite relationship and could not ignore Angus. He duly appeared

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<sup>244</sup> C.S. 5/28 fol. 33r-35v: 15-16 September, 1516.

<sup>245</sup> C.S. 5/28 fol. 38v: 25 September, 1516.

<sup>246</sup> C.S. 5/28 fol. 41r: 2 October, 1516.

<sup>247</sup> Kelley, *Douglas Earls of Angus*, 299ff.

for Margaret, and Angus for his interest, on twelve occasions the last of which was 22 March, 1519. From then on the summonses ran only in Margaret's name, until she remarried. Galbraith also appeared for Angus on five occasions during 1518. Two of these appearances, in March and April, were against the earl of Crawford in the ongoing dispute concerning Margaret's lordship of Methven, and Margaret was personally present with Angus's interest represented by Galbraith. After March 1519, Galbraith only represented Angus on one further occasion but this was not until 1527 when he was regent and his relations with Margaret had improved. The breakdown of the marriage between Margaret and Angus had ruptured the tripartite relationship. If Galbraith had been Angus' choice for Margaret, then this might have ended his role as her advocate. As it is, Galbraith's relations with Angus are difficult to characterise. He never appeared in an action against Angus. Even when the earl's forfeiture was in prospect in September 1528, Galbraith appeared before parliament for the queen not to condemn Angus, but to ensure that since he owed her considerable sums of money, that she would not be prejudiced by his forfeiture, and that some of his lands should be reserved to her.<sup>248</sup> Nor did Galbraith appear on Angus' behalf against Margaret. In 1519 it was Angus' uncle, Gavin Douglas, Bishop of Dunkeld, who presented his arguments to the lords of council concerning his claim to have the right to administer her lands.<sup>249</sup> The argument, based on a folio of passages excerpted from the treatises *Regiam Majestatem* and *Quoniam Attachiamenta*, is one of the best to have been preserved in the *acta* during the reign of James V. But it was not drafted by Galbraith.

<sup>248</sup> A.P.S., ii, 327: 5 September, 1528.

<sup>249</sup> C.S. 5/32 fols. 89A-89B; On Gavin Douglas, see Patricia Bawcutt, *Gavin Douglas*, (Edinburgh, 1976).



Galbraith does not appear to have been involved at all in the long drawn out divorce proceedings. Although this was a matter that was primarily argued in Rome, it did come before the lords of council one one occasion, much to their chagrin because they were unsure how to proceed. In March 1526 she petitioned the lords to charge heralds to instruct Angus to hand over houses and lands belonging to her since he had disobeyed papal letters of inhibition concerning those lands and had been excommunicated.<sup>250</sup> The petition was presented by the queen's procurator, Master William Stewart, who perhaps was one of her advisers concerning the divorce. The lords, never before confronted with such a request, suspended the matter 'sa that in the meyntyme thai may be avisit with cunnyng and expert men that thireftir thai may gif ane just sentence...as obedient sounis of halykirk'. This was much less confident than the assertion made by the lords in 1517 that they were competent judges in all matters concerning the king and his mother, although the political circumstances were very different.<sup>251</sup> The other man used by Margaret as her procurator, Master Robert Lauder, chaplain of St Sebastian's altar in St Giles, may also have advised her concerning the divorce. That Galbraith does not appear to have done so may indicate that for personal reasons Galbraith was unwilling to act against Angus.

In general terms Margaret's litigation involved debt and actions concerning the rents of lands which she claimed belonged to her in conjunct infeftment. In late February and early March 1518 she was involved in fourteen separate cases most of which concerned arrears of rents in Ettrick Forest in the sherifffdom of Selkirk.<sup>252</sup> In most of

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<sup>250</sup> C.S. 5/36 fol. 9r: 13 March, 1526.

<sup>251</sup> C.S. 5/30 fol. 201r: 26 February, 1517.

<sup>252</sup> Kelley, *Douglas Earls of Angus*, 299; C.S. 5/30 fols. 194v-208r *passim*. Only a few of these cases mention the presence of Galbraith, and these appear in Appendix 9.

these cases the queen was personally present and so there is no specific mention of Galbraith although his presence is indicated sufficiently often during this period to suggest that he was probably there all the time. Even when the queen was present he retained his designation of 'advocate' or 'procurator'. Tenants against whom actions were raised at this time included Lance Kerr and Thomas Kerr, both of whom owed four years' rent, and Philip Scott who owed two years' rent. In addition Margaret during this period also brought actions against John, Earl of Atholl, for intromitting with the goods of the late bishop of Caithness to which Margaret laid claim, and also against David, Earl of Crawford, for his intromission with the maills of her lordship of Methven in Perthshire.<sup>253</sup> As well as seeking unpaid rents, Margaret also litigated in order to regain possession of areas that had been taken from her; for example, in July 1527, she brought an action against William Edmonstone of Duntreath accusing him of wrongfully withholding her castle of Doune in Menteith.<sup>254</sup>

Although Galbraith was fully involved in these actions, it was not part of his role to advise Margaret on the running of her estates. This was left to a commission which initially composed English and Scottish representatives but which from December 1518 was reorganised and contained only Scots, including Robert Barton, comptroller, James Wishart, king's advocate, and Adam Otterburn.<sup>255</sup> As well as litigating, however, he ensured that the queen's legal rights did not go neglected before the lords of council. For example, at a justice ayre in Stirling in 1527 James Kinninmonth was fined forty pounds for failing to produce before the court a man accused of homicide

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<sup>253</sup> C.S. 5/30 fols. 202r, 204r.

<sup>254</sup> C.S. 5/37 fol. 152v: 11 July, 1527.

<sup>255</sup> Kelley, *Douglas Earls of Angus*, 300; *LPH*, ii, pt. II, no. 4677.

for whom he had acted as cautioner.<sup>256</sup> The fine was to be paid to the queen. When James got himself into further trouble, by being called before the lords for deforcing a messenger, Galbraith appeared and protested that if Kinninmonth was acquitted of the alleged deforcement, this should not affect the queen's right to the fine which he owed her. Three days later he again intervened to ensure that the queen obtained a fine owing to her from the same justice ayre by William Sinclair of Roslin and his tenants.<sup>257</sup>

Only one item of correspondence survives between the queen and Galbraith. It is a letter, dated, 23 April 1531.<sup>258</sup> In its directness it is similar to the only surviving letter from her late husband, James IV, to his advocate in 1513.<sup>259</sup> The major difference between the two letters is that Margaret, having remarried, was obliged to include in hers the subscription of her husband, Henry, Lord Methven, 'in signe of his consent'. Addressed only to her advocate, it instructed Galbraith, as soon as he had read it, to answer a summons raised against her and her son by Adam Stewart of Shawton.

Despite being appointed a lord of session in November 1537, Galbraith maintained his position as queen's advocate although perhaps he shared the duty of representing her with Henry Lauder, the king's advocate.<sup>260</sup> The role of queen's advocate did not end with the death of Margaret Tudor. Her daughter-in-law, Mary of Guise, initially had

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<sup>256</sup> C.S. 5/37 fol. 144r: 8 July, 1527.

<sup>257</sup> C.S. 5/37 fol. 153r: 11 July, 1527.

<sup>258</sup> C.S. 5/43 fol. 168r: *acta* entry dated 26 February, 1532.

<sup>259</sup> *HMC*, 4th Report, 504, no. 98 (Countess of Rothes): 14 July, 1513.

<sup>260</sup> For Galbraith as queen's advocate see, for example, C.S. 6/11 fols 169v-170r: 1 and 4 March 1539; for Lauder acting on her behalf, C.S. 6/14 fol. 159r: 11 February, 1540.

her own advocate independent of her daughter's advocate.<sup>261</sup> In June 1543 both the queen and her mother brought an action against William, Lord Sinclair.<sup>262</sup> William had directed the bailies of lands of the Orkneys and Shetland to ascertain how much land in that area was held by William's late father, Henry, and, if he was found to be nearest and lawful heir to that land, to enter Henry therein and to ensure that he received the rents.<sup>263</sup> The Queen was represented by her advocate, Henry Lauder, while Thomas McCalzeane, described as 'hir darrest moderis advocate' appeared for her mother. The reason why they were represented separately was that the queen was ultimate superior of the lands in question, the earldom of Orkney and the lordship of Shetland having been annexed to the crown in 1472, whereas income from the earldom of Orkney had been part of her mother's jointure in 1538 when she married James V.<sup>264</sup> In November McCalzeane arrested a ship containing goods belonging to Oliver Sinclair of Roslin, who held a lease of lands in Orkney and had allegedly been withholding the Queen Mother's castle of Kirkwall and her rents in the area.<sup>265</sup> This prompted a letter from Katherine Bellenden, Oliver's wife (and, incidently, widow of the lord of session, Francis Bothwell), to Mary of Guise seeking removal of the arrestment and ratification of their lease. In this letter McCalzeane was described as 'your graces man of law'.<sup>266</sup>

<sup>261</sup> Lauder was 'queen's advocate' in the strict sense of advocate for the crown.

<sup>262</sup> C.S. 7/1/2 fol. 420<sup>1</sup>v: 30 June, 1543.

<sup>263</sup> Henry had long been involved in a dispute concerning his rights in Orkney with members of a junior line in the Sinclair family and this had led to his defeat and capture in 1528 at Summerdale: P.D. Anderson, *Robert Stewart, Earl of Orkney, Lord of Shetland 1533-1593*, (Edinburgh, 1982), 20-28. [Henceforth, 'Anderson, *Earl of Orkney*'.]

<sup>264</sup> Anderson, *Earl of Orkney*, 19; Sanderson, *Cardinal of Scotland*, 66.

<sup>265</sup> *A.P.S.*, ii, 432: 31 August, 1542.

<sup>266</sup> *Correspondance of Mary of Lorraine* (Scottish History Society) no. 36: 23 November, 1543.

In April 1554 Mary of Guise became regent in place of Châtelherault.<sup>267</sup> The following year, as regent, she was represented by Henry Lauder, the queen's advocate, who acted in her name and in the name of her daughter in an action against Elizabeth Forbes, widow of the advocate Henry Spittall.<sup>268</sup> The action concerned a gift of the lands of Blairlogy made to Alexander Spittall, son of the James Spittall of Blairlogy, which Elizabeth claimed were part of her conjunct fee. The most interesting point about this case is that Elizabeth's advocate was Thomas McCalzeane. Clearly as regent the Queen Mother was entitled to use the queen's advocate.<sup>269</sup> After Mary of Guise there was no role for a queen's advocate, as distinct from the crown advocate, and the office, if it can be dignified with such a title (which is doubtful since there is no record of an official pension for the office holder) does not appear to have survived the sixteenth century.

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<sup>267</sup> Donaldson, *James V-James VII*, (Edinburgh, 1965), 83.

<sup>268</sup> C.S. 7/12 fols. 189v-192r: 31 July, 1555.

<sup>269</sup> Presumably she would also have used Lauder for matters relating to her as a private person although it would require further research, outwith the scope of this study, to verify this point.

## Chapter Seven

### Advocacy for the King (1): The Office of King's Advocate

#### *The early history of the office*

‘It happinit that the king him self come to the counsalhous among the lordis of session; and that samin day, the king being present, the said actioun aganis the said lord Seytoun was callit. At that tyme, thair was advocat for the king and justice clerk Maister Richart Lauson, quha yeid [went] to the bar, and concurrir and assistit to him Maister James Henrysoun, quha efter succedit to the said Maister Richart in his offices.’<sup>1</sup>

Around 1560 Richard Maitland of Lethington, in his *History of the House of Seytoun*, recorded this version of an action on the king's behalf against his maternal forebear, George, second Lord Seton. The king in question was James IV and the action concerned the recognition of the barony of Winchburgh.<sup>2</sup> Maitland's story is little more than a eulogy of Lord Seton's forespeaker in that action, Master David Seton, parson of Fettercairn. The portrait of David Seton painted is that of a man of great age who, when faced by two *parvenus* using their knowledge of the law to the prejudice of his kinsman, was willing to fight a duel with them in spite of his years, much to the amusement and admiration of the king. The story is humorous but had a serious point

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<sup>1</sup> Sir Richard Maitland of Lethington, *History of the House of Seytoun*, (ed.) J. Fullarton, (Maitland Club; Edinburgh, 1829), 25-6.

<sup>2</sup> Briefly, recognition was a feudal casualty which applied where a vassal purported to alienate more than one half of the land, which he held by ward and relief, without his superior's consent. The superior was entitled to take back the whole of the land: Skene, *D.V.S. sub. nom.* 'Recognition'; *A.P.S.*, i, 213-4. On its importance see Murray, *Exchequer and Crown Revenue*, 283-4. See 'The Procedure of Recognition' at the end of this chapter.

in its criticism of Lawson and Henryson, men, it was said, who 'wald invent wayis to disheris (disinherit) the barronis of Scotland'.<sup>3</sup>

Maitland's story contains much that is accurate.<sup>4</sup> In 1503 an action was brought on the king's behalf against Lord Seton for the recognition of Winchburgh.<sup>5</sup> The king was personally present in court. The three men named were also present. But Seton was not appreciably older than Lawson and his threat to fight him was fanciful given that Lawson was present as a lord of session and did not act for the king.<sup>6</sup> The fact that Richard Lawson of High Riggis was well known to Maitland's audience, together with a pun on his surname 'Lawson', explains the prominence assigned to him in the story.<sup>7</sup> But the central character in the original action was undoubtedly James Henryson, the king's advocate.

That his contemporaries recognised the importance attached to the office of king's advocate is clear not only from Henryson's activities during James IV's personal reign but also from the reaction to his death, which occurred during the Flodden campaign

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<sup>3</sup> Maitland, *History of the House of Seytoun*, 26.

<sup>4</sup> The characterisation may stem from Maitland's personal acquaintance with Seton who was still acting as a man of law in June 1515: C.S. 5/27 fol. 11v. He also appeared in Fife sheriff court in 1514, *Fife Sheriff Ct. Bk.*, 10; and as tutor to George, 3rd lord Seton, in February and June 1517: C.S. 5/28 fol. 209r; C.S. 5/30 fol. 50v. He may have been in his seventies at this time. Seton can be found in court as early as June, 1477 (*Prot. Bk. Darow* no. 461), giving him an active career of at least forty years. Maitland, born c. 1496, probably had no personal memory of Lawson.

<sup>5</sup> *A.D.C.*, iii, 313, 323; C.S. 5/14 fols. 3r, 4r-v, 5r-v, 6r-v, 7r-v, 8v, 9r. This action was one of several cited by Balfour from the first decade of the sixteenth century in his discussion of recognitions: *B.P.*, ii, 484.

<sup>6</sup> Seton graduated from St Andrews in 1468, Lawson did so in 1470: A.I. Dunlop, (ed.), *Acta Facultatis Artium Universitatis Sancti Andree 1413-1588*, vol. II., (Scottish History Society, 1964), 268.

<sup>7</sup> According to Lindsay of Pitscottie, claiming to have heard the story from an eye witness, Richard Lawson was spared from the battle of Flodden having taken an exception against a summons issued by the Devil at the market cross of Edinburgh (Robert Lindsay, *Historie and Cronicles of Scotland*, ii, 260ff.). Lawson was indeed spared from the battle: he died in 1507.



of September 1513.<sup>8</sup> Within a month of his death one of the first recorded public ceremonies was the swearing into office of his successor, James Wishart, as both king's advocate and justice clerk.<sup>9</sup> Henryson had held both offices since the demise of Richard Lawson, the justice clerk, in 1507, but he had been James IV's advocate since 1493.<sup>10</sup>

It is possible to extract two basic, although contradictory, claims about the early office of king's advocate: first, that John Ross of Montgremnan was the first office-holder and, secondly, that the office was always held jointly prior to 1532.<sup>11</sup> So far as they go, both claims contain an element of truth: but neither claim goes very far. When the evidence is assessed it indicates that the office of king's advocate as it was exercised by Henryson and Wishart was a recent invention, not more than twenty years old at the time Wishart took his oath. Only when the role of the advocate is properly understood, and the range of his activities on the crown's behalf investigated, can these apparent contradictions be resolved.

The responsibility for placing the origin of the office of king's advocate within the reign of James III must be shared by A.L. Brown and T.M. Chalmers. Brown was of

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<sup>8</sup> There is some mystery as to precisely how Henryson met his death. His name does not appear on any surviving list of casualties from the battle of Flodden, although foreign commentators may not have considered him worth mentioning: Emond, *Minority*, Appendix. It is possible that Henryson died prior to the battle; however, he was certainly alive on 27 July 1513 when he made his last appearance before the lords of council (C.S. 5/25 fol. 201r) and it is very likely that he set off for the military campaign soon after.

<sup>9</sup> C.S. 5/26 fol. 6v: 31 September 1513. There is no record of James Henryson performing a similar ceremony and the absence of such evidence lends weight to the suggestion made below that the office of king's advocate developed only during the personal reign of James IV.

<sup>10</sup> For Lawson's death see *Prot. Bk. Foular*, ii, no. 340: 25 August, 1507. Chalmers, *King's Council*, 246, is wrong to rely on what appears to be a misprint in Omond, *Lord Advocates*, i, 8, dating Lawson's death at 1508. A list of king's advocates is provided in Appendix 14.

<sup>11</sup> The first claim was put forward by A.L. Brown and T.M. Chalmers, the second by G.W.T. Omond.

the view that Sir John Ross of Montgrennan held the office from 1478 to 1488, whereas Chalmers went further by extending Ross' tenure from 1478 until his death in 1493.<sup>12</sup> In questioning this interpretation it is necessary to distinguish the nature of the office of king's advocate from the designation enjoyed by the office holder. It has been suggested that in the early sixteenth century the word 'advocate' was used exclusively to refer to His Majesty's Advocate.<sup>13</sup> Whilst it is true that in the majority of occasions on which the word is employed in the record, especially during the reign of James IV and the minority of James V, it is in reference to 'our soverane lordis advocat',<sup>14</sup> nonetheless there were occasions in the fifteenth century when the term was not employed in that sense.<sup>15</sup> A statute of James I concerning the provision of a man of law to 'pur creatures' in the realm specifies that: 'the king for the lufe of god sall ordane that the Juge before quha the caus suld be determyt purvay & get a lele & a wys advocate to folow sic pur creaturis causis'.<sup>16</sup> The loser was ordained to compensate the advocate for his 'costis and travale'. Five years later another statute, dealing with the oath *de calumnia*, refers to both 'advocatis & forespekaris' in temporal courts who are obliged to swear that the cause being espoused is good and

<sup>12</sup> A.L. Brown 'The Scottish Establishment in the later 15th century, J.R., (1976), 99; Chalmers *King's Council* 189, 459-60, tables 4.2.2.1(b), 4.2.2.2; also, *The Handbook of British Chronology* (3rd Edition). L.J. Macfarlane, *William Elphinstone and the Kingdom of Scotland 1431-1514* (Aberdeen, 1985), 174, accepts Ross as functioning as "Crown advocate" from 1478.

<sup>13</sup> J. Inglis *Sir Adam Otterburn of Redhall, 1524-1538*, (Glasgow, 1935), 4.

<sup>14</sup> 'Oure soverane lordis advocat', 'the kingis advocat' or 'the quenis advocat' are the phrases most often encountered. The phrase 'His Majesty's Advocate' does not, in fact, seem to be a contemporary term, nor does 'Lord Advocate'. The application of the word 'advocate' appears to narrow in the 1490s, before widening as the sixteenth century progressed until by the 1550s it was a common designation, outwith court, of a man who would still normally be called a procurator when in court.

<sup>15</sup> Isolated examples can be found throughout this period of the use of the word 'advocate' unconnected to the holder of the office of king's advocate. James Simson appeared as advocate for the Chancellor on several occasions prior to his becoming Official of Lothian: e.g. C.S. 5/33 fols. 101v, 107v, 109r. Adam Otterburn in November 1515 was described as advocate for Alexander and Robert Barton: C.S. 5/27 fol. 107v. In 1509 Otterburn undertook 'to be advocate' to Robert, Lord Erskine: S.R.O. G.D. 124/7/10 (Mar and Kellie Muniments). Conversely, the king's advocate was once or twice described as the king's procurator: e.g. in March 1539 (C.S. 6/11 fol. 206r).

<sup>16</sup> *A.P.S.*, ii, 8 c. 24.

legally arguable.<sup>17</sup> However the act of 1455 dealing with the clothing to be worn by practitioners in court refers only to ‘all men of law that ar forspekaris for the cost’.<sup>18</sup>

It is not until the 1470s that the term ‘advocate’ appears outwith acts of parliament and in reference to named individuals. These first references all belong to one source, the earliest extant protocol book, that of James Darow.<sup>19</sup> On 15 June 1478 John Drummond of Cargil and John Houston compeared as advocates respectively for Gilbert Galbraith and Agnes Galbraith and took an instrument that they had presented two brieves of inquest to the sheriff of Stirling.<sup>20</sup> The following month, on 27 July, Robert Colwell and Malise Williamson were designed ‘*advocati*’ of a certain Janet Hech.<sup>21</sup> Between these two incidents, on 8 June, the term ‘advocate’ is used as the designation of Sir John Ross of Montgrennan in an instrument, also recorded by Darow, narrating a diet of the sheriff court of Stirling held in Edinburgh.<sup>22</sup> However, in this source Ross was only advocate ‘*ut asseruit*’ (as he alleged), for the king; elsewhere in the same source Ross is described as the king’s procurator and as one of his commissioners *in hac parte*.<sup>23</sup> Ross, along with Alexander Leslie and James Shaw, had already been described as one of the king’s justiciars and commissioners *in hac parte* in September 1477 when involved in the perambulation of lands in the sheriffdom of Stirling.<sup>24</sup> In addition to this, in 1483 and 1485, Ross appeared a total of

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<sup>17</sup> *A.P.S.*, ii, 19 c. 16.

<sup>18</sup> *A.P.S.*, ii, 43 c. 12.

<sup>19</sup> (S.R.O.) B66/1/1 (henceforth *Prot. Bk. Darow*).

<sup>20</sup> *Prot. Bk. Darow*, no. 576: 16 June 1478.

<sup>21</sup> *Prot. Bk. Darow*, no. 595: 27 July 1478.

<sup>22</sup> *Prot. Bk. Darow*, no. 574: 8 June 1478.

<sup>23</sup> *Prot. Bk. Darow*, no. 461: 20 June 1477; no. 710: 23 February 1480. This latter was clearly a political duty not a legal one, involving the receipt of the keys to Stirling castle from its constable Andrew, Lord Avandale.

<sup>24</sup> (S.R.O.) R.H.6/469.

six times in parliament on behalf of James III. On these occasions he was speaking against those accused of treason for supporting the king's brother, the Duke of Albany, who was himself forfeited for treason in his absence in July 1483.<sup>25</sup>

These activities constitute the sum total of the evidence in favour of Ross of Montgrennan holding the office of king's advocate. Beyond those instances already given, there would appear to be no evidence of him using the title 'king's advocate' or any similar phrase. He was described as '*familiari armigero*' and '*familiari militi*' in grants by the king; he was praised for his military science and moral probity by Henry VII of England: but he was not described as the king's advocate.<sup>26</sup> When he did use that title, or a synonym such as procurator for the king, it was always in politically contentious circumstances. Although, as will be shown later, drafting and prosecuting summonses for treason was a small but significant aspect of the office of king's advocate, it accounts for virtually all of Ross' activity in that role. In the extraordinary political circumstances following the events of Lauder Bridge in 1482, the treason trials in which Ross featured were overtly political. Even the two appearances in the late 1470s in Darow's protocol book when Ross appears as procurator and then advocate for the king were politically sensitive. These were concerned with a brieve of inquest taken out by Agnes Menteith, wife of John Haldane of Gleneagles, relating to the lands of the earldom of Lennox. This well documented action was politically motivated, being used as an opportunity to reward the chancellor, Andrew, Lord

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<sup>25</sup> *A.P.S.*, ii, 151-2; Macfarlane, *Elphinstone*, 172-6; Macdougall, *James III* (Edinburgh, 1982), 188-90.

<sup>26</sup> *R.M.S.*, ii, nos. 1325, 1989. Henry's description occurs in a letter to Pope Innocent VIII in January 1489 when Ross, temporarily in exile following Sauchieburn, was seeking a return to Scotland: *Cal. State Papers (Venetian)* i 549. Clearly Ross was known for his military prowess and it was on that that his position and reputation as a statesman was based.

Avandale, with the liferent of those lands without reference to the lawful heirs who were later compelled to accept the grant in return for recognition of their rightful status.<sup>27</sup> Although it is undeniable that Ross of Montgrennan used, albeit very occasionally, the title ‘advocate for the king’, his role was clearly as much political as legal. He also used, and was described by, other titles. This lack of consistency, taken with the fact that he rarely functioned as the king’s legal representative and only in extremely restricted circumstances, points to the conclusion that as yet there was no specific office of king’s advocate. Moreover Ross, who was apparently responsible for drawing up James III’s forces for battle at Sauchieburn, encountered mixed fortunes after the king’s death in that encounter.<sup>28</sup> After a short exile in England he returned to become part of the administration of the realm during James IV’s minority and, although active as an ambassador and councillor during this period he did not act as king’s advocate.<sup>29</sup> Indeed, there is no evidence of him enjoying the title of king’s advocate at any time after 1485.

Nonetheless, during the first years of his minority the interests of James IV were often the subject of litigation before the lords of council.<sup>30</sup> The king was represented in this litigation, although due to the contemporary scribal practice the names of his

<sup>27</sup> See Fraser, *Lennox*, i, 288ff., ii 106-9; (S.R.O.) G.D. 214/37 (Professor Hannay’s Papers); Macdougall, *James III* 101-2; Macfarlane, *Elphinstone*, 174; J.H. Burns, *The True Law of Kingship* (Oxford, 1996), 8.

<sup>28</sup> Macdougall, *James III*, 300.

<sup>29</sup> For Ross as an ambassador see *Rot. Scot.*, ii, 509-10; and, as a councillor, see *A.D.C.*, i, *passim*.

<sup>30</sup> There are thirty-five examples from 21 October 1488 to 21 October 1493. *A.D.C.*, i, 96 (Inglis v Murray), 99 (King v Hering of Tulybole), 103 (Ramsay v Pattonson), 114 (Colquhoun of Luss v Clerk & Others), 121 (King v William, Bishop of Brechin); 122 (King and Robert Erskine v Colquhoun of Luss); 124 (King as tutor to James, duke of Ross v William Keith); 127 (King v Thomas Middilmest); 128 (King and James, duke of Ross v George and James Ramsay); 137 (King v Lord Oliphant, sheriff of Perth). Also 169, 171, 173, 190, 201, 206, 207 (twice), 212, 216, 217, 218, 223, 224, 241, 251, 253, 255, 257, 262, 265, 271, 287, 292, 307 (first mention of Henryson as king’s advocate).

representatives were only rarely recorded. Most of these entries merely stated that a summons had been raised or an allegation made ‘on behalf of our sovereign lord’. There are also enigmatic references to ‘our sovereign lords advocatis’ in the plural.<sup>31</sup> One such reference concerned the chapel of the *Maison Dieu* poor’s hospital in Brechin. The right to the chapel was disputed by James Ramsay, who claimed that James III had presented it to him, and Archibald Pattonson, who claimed that the duke of Ross, whom he alleged was the proper patron, had given it to him. The lords ordered the bishop elect of Brechin to send a commission to have the matter decided in Edinburgh so that the king might be able to ‘have his advocatis for the defence of his brotheris richt’.<sup>32</sup>

It is not possible to be definite as to the identity of these advocates; these might be references simply to whomever might be appointed to act on an *ad hoc* basis. The only men who were named as representing the king’s interests at this time were David Balfour of Careston, Alexander Inglis, the comptroller, and William lord St John the treasurer.<sup>33</sup> Of these, Balfour alone is described as forespeaker and advocate to the king.<sup>34</sup> Even so, he is named in this capacity only in a few cases whereas in the majority of the actions concerning the king no specific man of law is named. There is no evidence that Balfour used the title ‘king’s advocate’ generally as his designation. Whatever his role was, and whether it was exclusive to him or shared with others, he certainly did not exercise the range of functions associated with the developed office

<sup>31</sup> E.g., *A.D.C.*, i, 161, 217, 265.

<sup>32</sup> *A.D.C.*, i, 103.

<sup>33</sup> Inglis (*A.D.C.*, i, 96); St John (*A.D.C.*, i, 27). William Knollis, Lord of St John is described at this time as master of the king’s household and treasurer: Rot. Scot. ii 505. See also Macdougall, *James IV* (Edinburgh, 1989) 208.

<sup>34</sup> *A.D.C.*, i, 190, 212, 262, 292.

of king's advocate as it operated in the sixteenth century (see below).<sup>35</sup> In short, Balfour had more in common with Ross of Montgrennan than he had with James Henryson and later king's advocates, and on the basis of the available evidence neither Balfour nor Ross can be associated with the notion of a distinct office of advocate. This view is confirmed by the fact that when Balfour later briefly appeared for the king in Henryson's absence he was described, in terms reminiscent of John Ross, merely as 'comperand on the behalf of the kingis hienes his advocate *as he allegit*'.<sup>36</sup> This latter phrase would have been otiose if Balfour's status to appear for the king had been generally recognised.

Henryson is first mentioned as acting for the king in October 1493 some seven months after the last mention of Balfour doing so.<sup>37</sup> His appearance may conceivably be connected with an act of revocation by the king in June of the same year.<sup>38</sup> Fairly soon, however, it became evident that there was a marked difference between the position of Henryson and that of Balfour in that only the former received of an annual fee of forty pounds from the king, first paid in 1494-5.<sup>39</sup> This amount was regularised as an annual pension in October 1498 to last for his lifetime or until the king provided

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<sup>35</sup> The recurrent reference to plurals - advocates and procurators - does not necessarily mean more than one advocate or procurator. There is certainly no suggestion that Balfour should be considered a joint king's advocate in conjunction with others unknown.

<sup>36</sup> C.S. 5/9 fol. 257v. My italics.

<sup>37</sup> Balfour is last mentioned on 25 February 1493 as forespeaker for the king (*A.D.C.*, i, 292) although he does appear in place of Henryson on two occasions: C.S. 5/8 fol. 148v (*A.D.C.*, ii, 308; 21 January 1499); and, C.S. 5/9 fol. 257v (*A.D.C.*, ii, 472; 7 December 1500).

<sup>38</sup> Norman Macdougall has downplayed the significance of this act of revocation: *James IV*, 101-2.

<sup>39</sup> *T.A.*, i, 237.



him with lands to the same annual value.<sup>40</sup> This pension was consistently paid to Henryson and his successors, normally in equal bi-annual instalments.

To the seventeenth century compiler of the manuscript known as 'Lord Fountainhall's Collection' the notion of lords of session stepping from the bench to the bar to represent clients for money was considered remarkable; indeed, he raised a query whenever he came across instances of it in the record.<sup>41</sup> Yet the practice was evidently acceptable in the early sixteenth century. There are numerous instances of the clerk register, the justice clerk and the king's advocate all representing private clients before their fellow judges in the reigns of both James IV and James V.<sup>42</sup> Unfortunately the date at which the advocate became a lord of session *ex officio* is less clear. Prior to becoming justice clerk in 1507, James Henryson did appear as a lord of council and latterly was appearing in this capacity almost as often as Richard Lawson the then justice-clerk.<sup>43</sup> Despite this, there is no evidence of a link between Henryson becoming king's advocate and his becoming a lord of council, even though the former pre-dated the latter by less than two years.<sup>44</sup> A list of lords at the beginning of an early volume of the *acta* of the lords of council does list Henryson and design him *advocatus*.<sup>45</sup> However, that is not in itself decisive because after 1494 this quickly

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<sup>40</sup> *R.S.S.*, i, gives £50 but this is wrong. A payment was made in 1497 of £23 6s 8d in part payment of his 'pension': *T.A.*, i, 370. The word 'fee' is used the following year but thereafter 'pension' is the usual term used to describe his annuity.

<sup>41</sup> *E.U.L. La.* III 399 fols. 2, 9, 10, 11, 12.

<sup>42</sup> On one occasion James Henryson name appears on the sederunt followed by '*non debet poni [pro] [Ducissa] de Montros, quia procurator eius*'. On the day in question he did appear as the procurator for the Duchess of Montrose: *A.D.C.*, iii, 164 (17 January 1503).

<sup>43</sup> From November 1505 to November 1506 Henryson appeared in the sederunt on 37 occasions, Lawson on 40 occasions. On the earlier period see Chalmers, *King's Council* 460 [(tables 4.2.2.2(b) and 4.2.4.1(b)].

<sup>44</sup> The first occasion Henryson appears on a sederunt of the lords of council is on 15 June 1496: *A.D.C.*, ii, 2.

<sup>45</sup> *C.S.* 5/7 fol. 1Av (1496).

became his general designation. In a similar list of the lords of session given in October 1514, James Wishart is listed only under the designation justice clerk.<sup>46</sup> Nichol Crawford, his successor in that office, appears with the same designation in a list of the lords ordained to sit continually upon the session in November 1528.<sup>47</sup> The latter list also includes Adam Otterburn who was given no designation despite his status as king's advocate. Otterburn regularly appears on council sederunts throughout the 1520s but rarely with a designation although it is clear from his position on the sederunt that his position was elevated to some extent following his admission as king's advocate.<sup>48</sup> This contrasts with Crawford, whose appearances are recorded either by giving his name, his designation, or both. The earliest indication that the king's advocate as a distinct office holder should have a seat on the bench as of right does not occur until 14 February 1531 when the chancellor presented a list detailing those who had the right to vote on the session.<sup>49</sup> Included with the temporal lords were the treasurer, the secretary, the keeper of the privy seal, the justice clerk, the advocate and the clerk of chancery.

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<sup>46</sup> C.S. 5/26 fol. 168r.

<sup>47</sup> C.S. 5/39 fol. 1r.

<sup>48</sup> Normally only Otterburn's name is listed, however he is designed at C.S. 5/36 fol. 19r and at C.S. 5/37 fol. 13r (see Hannay, *College of Justice* 206). When he became king's advocate Otterburn began to be named earlier in the sederunt. He was always named after Wishart (whose presence was normally indicated by the designation *clericus justiciarie*). However following Wishart's death Otterburn's name virtually always appears before that of Nichol Crawford, the new justice clerk. In line with this Otterburn's name (without any designation) appears before that of Nichol Crawford (who is designed) in a list of the temporal lords of session in November 1528: C.S. 5/39 fol. 1r. But Otterburn also had precedence in the sederunt over Crawford during Wishart's lifetime as can be seen from a list of the lords in September 1524: C.S. 5/34 fol. 204v.

<sup>49</sup> C.S. 5/42 fol. 52r.

The fact that Otterburn sat on the bench does not appear to have caused him undue difficulties in performing his function as king's advocate.<sup>50</sup> Mention was made above of the vulnerability of the advocate to charges of partiality as a judge.<sup>51</sup> But wider controls existed to ensure that the advocate could not take unfair advantage of his position on the bench. Therefore, when Adam Otterburn brought an action against John Thornton for contravention of the acts of parliament which prohibited barratry (the unauthorised buying and selling of benefices), Thornton was successful in having the decret against him annulled for procedural irregularities.<sup>52</sup> Otterburn had obtained the decret 'privatlie' in the presence of only three lords, an insufficient number for that purpose.<sup>53</sup> Although the allegation of the presence of an inadequate number of lords is not a particularly rare one, the suspicion is that it was easier for Otterburn to use his office as king's advocate to obtain a decret in these circumstances than it would have been for other litigants.<sup>54</sup> In an arbitration, the fact that Otterburn was involved as one of the arbiters sufficed to disqualify him when one of the parties reclaimed from the decret arbitral to the lords of session.<sup>55</sup> The arbitration, between Robert, abbot of Balmerino in Fife on the one hand, and Sir William Scott of

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<sup>50</sup> Nor is there any reason why it should have done. James Foulis, one of the busiest advocates of the late 1520s, can be found sitting as a lord of session on days when he appeared for private clients.

<sup>51</sup> See, above, chapter five.

<sup>52</sup> On barratry generally see R. Nicholson, *Scotland: The Later Middle Ages* (Edinburgh, 1974), 294-5; 557. On Thornton, see I.B. Cowan 'Patronage, Provision and Reservation, Pre-Reformation Appointments to Scottish Benefices', in *The Renaissance and Reformation in Scotland*, (edd.) I.B. Cowan and D. Shaw, (Edinburgh, 1983), 83-4, 87.

<sup>53</sup> C.S. 5/38 fols. 8v-9r; also C.S. 5/37 fol. 239v. The major ground of nullity in favour of Thornton was that 'the said decrete was gevin privatlie be thre of the lordis of counsale with the chancellor allanerlie quhilkis be the law and practik of the sessioun war nocht sufficient in novmer to deliver ane complant and mekle less to gif ane decrete or sentence diffinitive in ony actioun movit in the sessioun'.

<sup>54</sup> On the plea of 'lack of nomer' amongst the lords, see chapter five. Otterburn was undoubtedly aware of the fact that the procedure was illegal but it is conceivable that he hoped to get away with it. Certainly he did not anticipate Thornton's action to annul the decree which was, at most, a delaying tactic.

<sup>55</sup> C.S. 5/37 fols. 161r, 164r, 194r, 199v, 214v, 222v, 226v, 237r; C.S. 5/38 fol. 83v; C.S. 5/39 fols. 52v, 53v, 54r.

Balwearie, William Scott his son, Hugh Moncreiff and Thomas Scott, on the other, concerned the lands of Petgorno. It must have appeared to Otterburn as though the king had no interest in the matter, otherwise it is unlikely he would have agreed to be an adjudicator in the dispute. The king, alleging that he did have an interest, took the remedial step of issuing letters of inhibition to stop the arbitration and restore the matter to the session. These letters were allegedly presented to the arbiters before they pronounced their decret and, by being party to such a breach of a royal inhibition, Otterburn could not represent the king in the matter once it returned to the session. He had already, with his fellow arbiters the bishop of Galloway, the official of Lothian and Peter Carmichael, decided in favour of the abbot.<sup>56</sup> Robert Leslie took his place as the king's representative, albeit appearing as 'advocat for oure soverane lord' rather than 'oure soverane lordis advocat' which was the regular designation for the king's advocate.<sup>57</sup>

In terms of procedure, although a specific day was assigned to the hearing of actions directly involving the king, there were less obvious cases over and above these from which might emerge issues affecting the king's interest.<sup>58</sup> Whilst the use of the 'king's table' permitted the advocate to manage conveniently the majority of cases with which he had to deal, he still faced difficulties when cases were heard in his absence.<sup>59</sup>

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<sup>56</sup> C.S. 5/37 fol. 237r.

<sup>57</sup> C.S. 5/37 fol. 226v. This subtle difference in terminology was significant. Compare this phraseology with Robert Crichton's admission as advocate in 1581 mentioned below.

<sup>58</sup> The advocate, of course, was also instructed directly by the king, or, during a minority, by the governor, to act in a particular case or adopt a specific line of conduct. Surviving correspondence between the king and his advocate is rare. See, for example, *H.M.C.* 4th Rep. (Countess of Rothes), Appendix, pages 503ff., nos. 97 and 98; for Albany instructing the advocate to act, see C.S. 5/28 fol. 85v. A letter from the king to Otterburn is recorded in the *acta* in 1536: C.S. 6/7 fol. 150r.

<sup>59</sup> For the use of this table see chapter five. The 'king's table' was a table containing privileged summonses affecting the king's interest.

These potential difficulties were augmented by the fact that the advocate *per se* did not have the right to be admitted to the council chamber and so in theory had no right to hear all the cases and decide whether or not any of them raised issues affecting the crown. In practical terms, however, these were not serious problems. To assist him, the advocate could rely on the rule developed by the lords that no judicial deliverance prejudicial to the king was valid unless the king's advocate had been warned to compear for the king's interest.<sup>60</sup> Warning was generally given by the opposing party, but the lords themselves could warn the advocate to compear.<sup>61</sup>

Moreover, in practice the early king's advocates were also lords of session, therefore having no difficulty gaining access to the council chamber. A problem only emerged when Henry Lauder, who was not a lord of session, was thrust into the office late in 1538 after Otterburn's sudden fall from grace.<sup>62</sup> This was partially remedied in January 1539 by the intervention of the king, who ordered the lords to admit:

'oure lovit familiar clerk maister henry lauder our advocat to sett and remane in oure counselhous to heir and se delivering of billis geving of interlocutouris decisiounis and determinaciounis of all causis and actiounis sua that he may heir and knaw sik thingis as sal happin to occur that concerns ws exceptand alwayis the actiounis and causis for the quhilkis he beis advocat and speikis for at the bar alanerly'.<sup>63</sup>

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<sup>60</sup> C.S. 5/27 fol. 164r; C.S. 5/43 vol. 8v. For an example of the lords refusing to admit a protest in an action because it involved the king, see C.S. 5/39 fol. 42r (King v John Grahame of West Hall). The king's advocate was present and stated that no procedure should be had in this case until he was warned to appear.

<sup>61</sup> C.S. 5/18/2 fol. 11v. The lords warned James Henryson to wait until the next warning regarding the matter between the King and the abbot of Dunfermline concerning the superiority of Cluny.

<sup>62</sup> Lauder was the obvious candidate to replace Otterburn having acted as his depute on several occasions in the 1530s. See below.

<sup>63</sup> C.S. 6/11 fol. 82r.

In any action in which Lauder spoke at the bar for the king, he remained under the same obligation as any other man of law to retire and allow the lords to deliberate in secret.<sup>64</sup> This position was, however, only temporary: within a few months Lauder was admitted to a vacancy on the bench.<sup>65</sup>

### **The role of the advocate-depute**

If anything, the role of lord of session added to the burden of political and administrative duties which the king's advocate had to bear and which might lead to periods of enforced absence. Such absences - especially at justice ayres or on foreign embassies - did not commonly fall when the lords of session were sitting, but when they did it was the practice to appoint in advance one or more substitutes to appear on the king's behalf.<sup>66</sup> As previously noted, David Balfour twice represented the king, in 1499 and 1500, on occasions when there is no indication of Henryson being present. In December 1509 Adam Otterburn appeared for the king during Henryson's absence,<sup>67</sup> while Robert Galbraith represented James V in 1528 during Otterburn's absence.<sup>68</sup> Other substitutes for Otterburn during the reign of James V were Thomas

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<sup>64</sup> *A.D.C.P.*, 377. See chapter five for examples of instances when Lauder, having become a lord of session, was required to pass from the bench to the bar and not vote due to suspected partiality. By the terms of the oath *de fidei administratione* Lauder, as a lord of session, was bound to keep secret those deliberations of the lords to which, as one of their number, he was privy.

<sup>65</sup> Lauder first appears on the bench on 2 March, 1540: *C.S.* 6/12 fol. 57v.

<sup>66</sup> In a letter dated at Stirling on 12 March 1536 James V instructed Adam Otterburn, who was about to leave the realm on the king's 'erandis', to ensure that nothing was done in relation to a case concerning the sheriffship of Tweeddale until Otterburn's return because "ye have our defencis of the samin": *C.S.* 6/7 fol. 150r. Otterburn then left to pursue political negotiations in London: Inglis, *Otterburn*, 62. He had returned by 13 July: *C.S.* 6/8 fol. 103r.

<sup>67</sup> *CS.* 5/21 fol. 49r. Otterburn's full designation was 'advocat for our soverane lord for the tyme'. He appeared again with a similar designation in February 1517: *C.S.* 5/39 fol. 20v. It should be noted that the examples given in the text are not exhaustive.

<sup>68</sup> *C.S.* 5/39 fol. 20r: 7 December. This was a special constitution further details of which are given below.



Scott,<sup>69</sup> James Foulis,<sup>70</sup> Henry Balnavis,<sup>71</sup> Henry Lauder,<sup>72</sup> and Thomas Marjoribankis.<sup>73</sup> During the minority of Mary (1542-1554) Thomas Kincairg<sup>74</sup>, James McGill (described specifically as procurator to Lauder in his absence),<sup>75</sup> Hugh Rigg,<sup>76</sup> Thomas McCalzeane,<sup>77</sup> David Borthwick<sup>78</sup> and Adam Otterburn<sup>79</sup> all appeared as substitutes for Henry Lauder. The earliest reference to an ‘advocate depute’ was

<sup>69</sup> In May, 1530: C.S. 5/41 fols. 74r, 81v; and July, 1532: C.S. 6/2 fol. 223r. Scott, the son of William Scott of Balwearie, was named as one of those who had a vote on the session in February 1531: C.S. 5/42 fol. 52r. He can be found in the king’s service as one of the king’s squires and gentlemen in February 1529 (*R.M.S.*, ii no. 4073) and was active in diplomatic affairs (*T.A.*, v 409, 441; vi 43, 270). In 1536 he replaced the late Nichol Crawford as justice clerk: *R.M.S.*, ii no. 2004.

<sup>70</sup> From August to December 1530 in Dundee and Perth: C.S. 5/41 fols. 97v, 117v, 119v, 135v. Inglis plausibly explains Foulis’ appearances on the basis that the king’s advocate Otterburn was unable to leave Edinburgh, where he was provost, when the court vacated the burgh in time of plague: Inglis, *Otterburn*, 25 n.2. This convincingly disposes of the idea, found in the *Dictionary of National Biography* and since repeated elsewhere, that Foulis was joint king’s advocate from 1527.

<sup>71</sup> C.S. 6/10 fol. 106r: 5 June, 1538.

<sup>72</sup> In December 1533 and May 1534: C.S. 6/3 112v; C.S. 6/4 fol. 141v; *Yester Writs*, no. 501. This last reference mentions a letter from the king instructing the lords of session to delay a matter and continue the summoning of the advocate until his return from England where he was to pass in the king’s service. The letter was presented to the lords by Henry Lauder, king’s advocate in Otterburn’s absence. Lauder also appeared ‘in absence of’ Adam Otterburn in June, 1532 when Otterburn was negotiating a truce with England: *A.D.C.P.*, 405; C.S. 6/2 fols. 209v, 223v. He also did so late in 1533 during Otterburn’s absence (C.S. 6/3 fols. 95r, 111v, 112v, 170v) and again in 1536 when Otterburn was in London: C.S. 6/7 fol. 165v. See above fn. 66. Other appearances at this time may be found at C.S. 6/7 fols. 167v, 178r, 182r, 183r, 184r; C.S. 6/8 fols. 11r, 14r, 26v.

<sup>73</sup> C.S. 6/7 fol. 173r (29 March 1536); C.S. 6/8 fol. 17v (19 May 1536). This was also during Otterburn’s time in London.

<sup>74</sup> In November 1544: *A.P.S.*, ii, 447-8.

<sup>75</sup> 21 June 1547: C.S. 6/23 137r. Lauder was absent because in May along with Master John Scrimgeour he had been commissioned to go to Dundee to hold courts and take cognition concerning spuilzie and to make a retour on 15 June (C.S. 6/23 fols. 80r-v). Evidently Lauder was late in returning. He had certainly left by 10 June when Master Thomas McCalzeane his “substitute” appeared as the queen’s advocate: C.S. 6/23 fol. 125v. This suggests a multiple constitution similar to that of November 1546 mentioned below (see fn. 86).

<sup>76</sup> In December 1546: C.S. 6/28 fol. 62r.

<sup>77</sup> In November, 1543: *Correspondance of Mary of Lorraine* (Scottish History Society) no. 36. Also (as mentioned above) in June 1547: C.S. 6/23 fol. 125v.

<sup>78</sup> In December 1548: C.S. 6/28 110r.

<sup>79</sup> *R.M.S.*, no. 2885 (18 March, 1543). This entry describes Otterburn as “*regis pro tempore advocatum*”. Unfortunately this cannot be amplified by reference to the *acta* of the lords of council and session because there is a gap in the record at this period. Lauder as king’s advocate brought an action against Otterburn, his wife Euphemia Ramsay and his son John, in 1541, seeking to reduce the alienation to them of the lands of Gorgie made by the late Sir James Hamilton of Finnart and James Colville of East Wemyss: C.S. 6/16 fol. 84v-85r. This does not appear to have affected Lauder’s relationship with Otterburn however, since Otterburn agreed to Lauder acting as one of the arbiters in an arbitration between John Stanhope and him: C.S. 7/1/2 fol. 412r (20 June 1543).



made in November 1533 when the term was applied to Henry Lauder.<sup>80</sup> Conversely Lauder was described as 'principale advocat' in November 1544 when, during his absence, the king was represented by Thomas Kincraigie.<sup>81</sup> It would appear that deputes or substitutes had the same competence as the king's advocate and might do anything that was judged to be to the advantage of the crown provided that the king's advocate might do the same were he present.<sup>82</sup>

The use of deputes reflects the fact that the king, like any other litigant, could constitute one or more advocates to represent him either specially or generally.<sup>83</sup> In the examples above it is often impossible to tell from the context which type of constitution is involved. However there are at least three definite examples of special constitutions which can be identified. The first is the most striking. In September 1528 Robert Galbraith was specially constituted by the king to represent him in a dispute which had been ongoing since the early 1520s concerning the lands of Nether Loudoun and Stevenston in Ayrshire.<sup>84</sup> Galbraith had earlier represented the king's brother, James, Earl of Moray, in the same dispute and was the natural choice when, in the absence of the advocate, the king in conjunction with his brother sought to bring an action of error to overturn the verdict of an inquest which had served Marion

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<sup>80</sup> C.S. 6/2 fol. 111v. Lauder appeared in the same capacity in January and May 1534: C.S. 6/3 fol. 170v and 6/4 fol. 141v. He also appeared as 'advocate depute to the kingis grace' in May and June 1536: C.S. 6/8 fols. 14r, 34v, 67v.

<sup>81</sup> *A.P.S.*, ii, 447-8.

<sup>82</sup> This is evident from the terms of a judgement given in December 1546. The lords stated that Hugh Rigg, as advocate in Lauder's absence, had the right to renounce a criminal action which had already been raised by the queen's advocate without requiring a special mandate: C.S. 6/28 fol. 62r.

<sup>83</sup> *R.S.S.*, ii, no. 1345. A 'special constitution' means that the advocate was mandated to represent his client in a particular case only; a 'general constitution' indicates a mandate to deal with any cases which may arise affecting that client, perhaps during a specified time.

<sup>84</sup> C.S. 5/38 fols. 162r-163r; C.S. 5/39 fols. 20r-v. The major references to the dispute are: C.S. 5/33 fols. 37v-39v, 40r-40v, 115r, 166r, 191r-194v; C.S. 5/38 fols. 162r-163v; C.S. 5/39 fols. 20r-v; C.S. 5/42 fol. 64v; C.S. 5/43 fols. 84v, 103r-v, 106r-v, 150r, 157r-v, 197r.

Campbell as heiress to the lands in question.<sup>85</sup> Galbraith's authority to act seems to have expired at the conclusion of the action of error. Three years later a new phase to the dispute arose in which William Cunningham brought an action against Moray and Hugh Campbell to have the lords' decret of 1528 'retretd' (annulled).<sup>86</sup> This time Galbraith was prelocutor for Campbell and stated that although he had been advocate for the king when Marion's retour had been reduced: 'that office was now deid in him and he had na powar therein and als the kingis grace had uther advocatis'.<sup>87</sup> Galbraith went on to argue explicitly that his 'advocation' had expired. He simply no longer had authority to function as king's advocate.

Galbraith was chosen to act in this case probably because he was already familiar with the complexities of its earlier phase at which time the king's advocate involved was James Wishart (who had since died). In 1528 Adam Otterburn, his successor, was about to set off on an embassy when the case arose and it may have seemed desirable to constitute Galbraith to see the matter through.<sup>88</sup> The other two examples of special constitutions occurred when for some reason the king's advocate could not act on the king's behalf. The first of these has already been mentioned: Robert Leslie acting for the king when Otterburn was involved in an arbitration that was reclaimed to the

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<sup>85</sup> The facts are complex and confusing. The basic dispute involved Hugh Campbell, sheriff of Ayr and William, master of Cunningham. However, the king assigned his rights to nonentry in the land to his brother (C.S. 5/33 fols. 191r-194v) and so provided him with an interest in the dispute. Although Galbraith represented Moray at the serving of the brieve in 1528 (Laing Chrs. no. 365), seven years earlier he was Marion Campbell's forespeaker (C.S. 5/33 fol. 37v) and in 1531 (C.S. 5/43 fol. 106r) he was to act in the same capacity for Hugh Campbell in a separate action connected with the same dispute.

<sup>86</sup> C.S. 5/43 fol. 106r.

<sup>87</sup> C.S. 5/43 fol. 103v.

<sup>88</sup> There may also have been a political motive since Hugh Campbell was one of those instrumental in the king's escape from Angus' custody and Galbraith may have been his choice.

session.<sup>89</sup> The other instance is similar and occurred in 1530 when Thomas Scott represented the king in an action of error against the provost and bailies of Edinburgh and an inquest which they had summoned. Otterburn, as provost of Edinburgh, was again disqualified from representing the king in this case, although he did so in all other cases at the time.<sup>90</sup>

To complement these examples, there are at least two definite instances of the general constitution of an advocate-depute. In November, 1533, Adam Otterburn named Henry Lauder as his depute 'in all our soverane lordis materis' and Lauder accepted the office.<sup>91</sup> When Lauder himself was the queen's advocate in November, 1546, he constituted at St Andrews Marjoribankis, Rigg, McGill, McCalzeane and Borthwick as his substitutes in all actions and business concerning the queen until his return.<sup>92</sup> The wording of this latter constitution clearly gives the impression that Lauder was responsible for selecting his own replacements.<sup>93</sup> In Lauder's absence during December 1546 the cases concerning the queen appear to have been divided between only Rigg (who appears thrice) and McGill (one appearance). This is in line with general practice where only a minority of those named in a multiple constitution

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<sup>89</sup> See above, fn.56.

<sup>90</sup> C.S. 5/41 fols. 74r, 81v. See above, fn. 69.

<sup>91</sup> C.S. 6/2 fol. 111v. It should be pointed out, however, that two actions involving Otterburn as king's advocate were suspended, by a letter from the king, until his advocate's 'hamecuming furth of Ingland': C.S. 6/2 fol. 112v. On the reason for Otterburn's absence, see Inglis, *Otterburn*, 49.

<sup>92</sup> C.S. 6/28 fol. 75v ; *A.D.C.P.*, 559. Lauder was in St Andrews when the court began sitting there on 16 November (C.S. 6/22 fol. 1r) but where he went when he left is unknown, although his destination was probably Edinburgh. At the end of December Arthur Hamilton was paid four shillings to carry writings from St Andrews to him (*T.A.*, ix, 47). On 17 January, after the Christmas vacation, he was back in St Andrews (C.S. 6/22 fol. 71r).

<sup>93</sup> This constitution appears in a writ found together with the *acta*; the entry for November 26 does not indicate that it was recorded on that day. No doubt the constitution would have been recorded in the book of procurators, if it was still being maintained, and presumably constitutions of a similar type were also noted there. For such a constitution, see fn. 75 above.

actually appeared in court.<sup>94</sup> In 1525 the lords auditors of the exchequer had been adamant that they had no power to make or discharge a comptroller.<sup>95</sup> The same was probably true where the lords of session and the office of king's advocate, or even advocate-depute, was concerned. Nevertheless, it would appear that the initiative to name deposes or substitutes for the advocate was not solely the preserve of the king, although any discretion the advocate exercised to name his own deposes would have been without prejudice to the king's ultimate right to make or discharge the principal advocate.<sup>96</sup>

Having questioned the view that Ross of Montgrennan was the first king's advocate and that he was succeeded by David Balfour of Careston, it is necessary to address its essential corollary: the question of whether the office was held jointly. If Ross held office until 1493 as has been claimed, then Balfour's activities on the king's behalf prior to this would suggest that more than one person could hold the office of king's advocate simultaneously.<sup>97</sup> Such a suggestion is supported by Omond who claimed that there were, in the period before 1532, two king's advocates at any one time.<sup>98</sup> It is certainly true that the phrase 'oure soverane lordis advocatis' does appear in the *acta* of the lords of council in the fifteenth century, but this is ambiguous and need not be a

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<sup>94</sup> Rigg appears in three separate cases: C.S. 6/22 fol. 32r (3 December); C.S. 6/28 fol. 62r (10 December) and C.S. 6/22 fol. 48r (11 December). McGill also appears, but again dealing with a separate matter, on 11 December: C.S. 6/22 fols. 46r-v.

<sup>95</sup> C.S. 5/35 fol. 148r.

<sup>96</sup> In November 1544 Thomas Kincaigie was deputed by the governor to act as queen's advocate in the absence of Lauder. Although the wording refers to this happening 'in tyme tocum quhen tyme requiris' the appointment was only a short-term measure: *A.P.S.*, ii, 447-8.

<sup>97</sup> Ross of Montgrennan was still alive when Balfour appears on the king's behalf in the early 1490s and, as was pointed out earlier, it has been claimed by Trevor Chalmers that Ross was king's advocate until 1493; see fn. 12 above.

<sup>98</sup> Omond, *Lord Advocates*, i, 8 n.3. Omond gives no contemporary evidence to substantiate his assertion.

reference to two (or, indeed, more than two) king's advocates working simultaneously. The only other direct evidence in favour of Omond's view is a reference to the pursuit of a summons of error by Adam Otterburn and James Foulis 'as advocatis to our soverane lord'.<sup>99</sup> These were the 'uther advocatis' to whom Robert Galbraith referred in 1531 and the summons of error in question related to the long series of disputes concerning the lands of Nether Loudoun. The significance of this reference is not, as has sometimes been claimed, that Otterburn and Foulis were joint advocates. It indicates that, like Galbraith, both had been involved in representing the king, perhaps even at different stages in the same litigation, but separately rather than jointly. Foulis had been appointed advocate depute when the court moved out of the capital to avoid the plague at a time when Otterburn, not only king's advocate but also serving as provost of Edinburgh, was obliged to remain behind.<sup>100</sup> Standing against this evidence is the regular practice of appointing substitutes for the advocate to represent the king. This strongly indicates that the office of advocate was generally not held jointly at least prior to Mary's reign.<sup>101</sup>

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<sup>99</sup> C.S. 5/43 fol. 106r.

<sup>100</sup> Inglis, *Otterburn*, 25. See fn. 70. Confusion concerning Foulis may occur because from 1527 he is found acting as a lord of session in his own right. His legal activities do not suggest that he was acting in this capacity *ex officio* as joint king's advocate as some scholars have claimed.

<sup>101</sup> It is interesting to note that when the office of king's attorney emerged in England in the thirteenth century it was likewise not held jointly. As in Scotland, there is no record of the man said to have held the office first (Lawrence de Brok) actually being sworn into it. Lawrence first appeared in 1243 acting for the king and was paid a regular fee, but it was not until William Langley in 1315 that there is evidence of appointment by letters patent and swearing into office; even so, it was not until 1527 that the title "king's attorney" became a regular designation: *Law Officers and King's Counsel*, (ed.) J. Sainty, (Selden Society supplementary series, vol. 7; London, 1987), 41; G.O. Sayles, (ed.), *Select Cases in the Court of King's Bench*, v, (Selden Society; London, 1958), xxx-xl; G.O. Sayles (ed.), *Select Cases in the Court of King's Bench*, vi, (Selden Society; London, 1965), xxviii-xxx. Provision was made, however, for the king's attorney to appoint his own deputy or deputies: W. Holdsworth, *A History of English Law*, vi, (London, 1937), 460, n.3.

For the wider picture it is necessary to investigate briefly how the office was held later in the century. The earliest unambiguous reference to two advocates holding office at the same time does not occur until 1555 when Master John Spens of Condie was granted a pension, and the queen's special and general mandate, in the same terms as that held by Henry Lauder, queen's advocate, to be held jointly with him.<sup>102</sup> No reason for such an appointment was given and Lauder's regular appearances in the late 1550s indicate that he was still in robust health. While Lauder was certainly the senior man in terms of age and experience, both he and Spens in practice appear to have enjoyed the same functional competence. To complicate matters, a third advocate, Robert Crichton, was appointed by the Regent, Mary of Guise, in February 1560 to act as 'ane of oure soveranis advocattis'.<sup>103</sup> Both Spens and Crichton retained their positions following Lauder's death in July 1561.<sup>104</sup>

It is likely that Spens replaced Lauder as the principal advocate with Crichton, except for a brief hiatus following his escheat for participation in the battle of Langside in 1568, acting as his depute.<sup>105</sup> Crichton regularly appears in the 1560s under the designation queen's advocate, reappearing in the early 1570s designed as king's advocate.<sup>106</sup> However, it was Spens who held the position on the bench which the advocate had come to hold *ex officio*, a position which on his death in 1573 was given

<sup>102</sup> *R.S.S.*, iv, no. 3059 (21 October 1555).

<sup>103</sup> *R.M.S.*, v, no. 749.

<sup>104</sup> Lauder's death on 19 July 1561 is indicated by a marginal entry next to the sederunt on that day: *C.S.* 1/2/1 fol. 28r.

<sup>105</sup> For Crichton as a fugitive after Langside, see *R.S.S.*, vi, no. 301 (8 June 1568). Apparently he returned to office quickly: see *R.M.S.*, iv, no. 2137 and *R.S.S.*, vi, no. 1271 (Spens and Crichton, king's advocates, 1571). It was Spens rather than Crichton who appeared on the sederunt of the privy council in November 1561: *R.P.C.*, i, 188.

<sup>106</sup> For example: *E.R.*, ix, 489 (1562); *R.S.S.*, vi, no. 1271 (Spens and Crichton, king's advocates, 1571).



to Master David Borthwick, his successor as king's advocate.<sup>107</sup> The stated reason for favouring Borthwick over Crichton was his many years of experience of the laws and practick of the realm: like Spens, he was simply the much more experienced man.<sup>108</sup> This reinforces the view that after his initial appointment in 1560 Crichton was intended to function under the instructions of the advocate and as his depute. His inferior position is reflected in the fact that it was not until the day after Borthwick was buried in 1581 that Crichton was at last admitted to a seat on the bench as king's advocate.<sup>109</sup> It seems incongruous that Crichton, described in the record as 'advocat to our soverane lord' should appear clutching privy seal letters which constituted him 'our said soverane lordis advocat'.<sup>110</sup> The difference, however, is clear: this was promotion from advocate depute to principal advocate. Indeed, Crichton had received his appointment in January 1580 to take effect immediately on Borthwick's death and had produced his letters of appointment on 19 December that year presumably with Borthwick's demise in prospect.<sup>111</sup> It was not until some six weeks later, when Borthwick was actually dead, that Crichton was admitted into office.

<sup>107</sup> *R.S.S.*, vi, no. 2155 (15 October 1573). There is a gap in the *C.S.* series at this period however there is reference in the reliable *E.U.L.* MS La. III 399 fol. 69 to Borthwick's admission on 20 October to the place on the session held by the recently deceased Spens. Spens in fact died during the last two weeks of June 1573. His last will and testament was dated 16 June of that year: *C.C.* 8/8/3 fols. 54v-55r.

<sup>108</sup> Borthwick, a student at St Andrews in 1525, was made a burgess of Haddington as early as July 1531: *S.R.O.* G.D. 1/413/1; see also *S.R.O.* B30/1/2 fol. 25r (*Prot. Bk.* Alexander Symson of Haddington). As a servant of the king's secretary, Sir Thomas Erskine of Brechin, he went to France late in 1535: *C.S.* 6/7 fol. 13r. Moreover he was named as a potential substitute to Henry Lauder as early as 1546: see above fn. 92. Crichton's third wife was Isobel Borthwick, perhaps a relative of Master David: *R.M.S.*, iv no. 2817: 24 November 1578.

<sup>109</sup> It is clear from the confirmation of his testament that Borthwick died on 30 January 1581: *C.C.* 8/8/10 fols. 239v-241v.

<sup>110</sup> *C.S.* 1/3/1/ fol. 142r: 1 February 1581.

<sup>111</sup> The Exchequer Rolls only mention Crichton as king's advocate in the compt of William Murray of Tullibardine in 1580 (*E.R.*, xx, 549) whereas Borthwick and Crichton are recorded as advocates to the king in 1575 (*E.R.*, xx, 467).



A year after his admission Crichton, now principal advocate, appointed Alexander Chene advocate depute.<sup>112</sup> This appointment recalled earlier practice in that it did not bear to have been made directly by the crown (although it could hardly have been made without royal approval). Chene was to pursue or defend all the king's matters as if the principal advocate were himself present to do so, but he was clearly subordinate: it was made plain that he was to hold office during Crichton's will provided he did not prejudice his honour.<sup>113</sup> Crichton did not long enjoy tenure of the office of principal advocate. After his death he was replaced in June 1582 not by Chene but by David McGill of Nesbit who also took Crichton's place on the session.<sup>114</sup> McGill had already been recognised as the advocate's substitute in a royal letter of March 1582.<sup>115</sup> Moreover, he had brought himself to official attention in 1580 by proposing to the king articles for reform of procedure before the court which prompted the king and his council to instruct the judges to admit him to their presence that he might explain his ideas.<sup>116</sup> Shortly prior to Crichton's death, the king and his ministers declared themselves satisfied with McGill's previous service as Crichton's substitute and appointed him generally to 'supplie the place of our Advocate in his absence' in all

<sup>112</sup> C.S. 1/3/1 fol. 164r: 30 January 1582. This can be compared with Lauder's nomination of substitutes in 1546 although that was a purely temporary measure.

<sup>113</sup> Although Chene had connections to Aberdeen (see *R.M.S.*, viii, no. 1920), where he was commissary in 1585, the terms of his appointment are clearly general and not simply regional.

<sup>114</sup> 26 June 1582: C.S. 1/3/1 fols. 174r-v. David McGill was the brother of James McGill, the late advocate and Clerk Register: *Prot. Bk. King*, no. 123: 12 June, 1556; (S.R.O.) C.C. 8/8/11 fol. 151v: 15 October, 1579. There is some evidence that David had been a substitute advocate during Mary's minority: *Prot. Bk. King*, no. 225: 16 March, 1557.

<sup>115</sup> *R.S.S.*, viii, no. 720: 13 March 1582. Possibly McGill was the king's choice as advocate depute as opposed to Chene who was Crichton's choice. In 1579 both James and David McGill had been overlooked as successor to their father as Clerk Register although the latter in his will had hoped, through his influence with the earl of Morton, to have one or the other succeed him: C.C. 8/8/11 fols. 146v-152r: 16 October 1579.

<sup>116</sup> C.S. 1/3/1 fols. 118r-v. The king's letter to the court described McGill as a man of a 'zelous mynd' but did consider his 'overtures sumquhat dowtfull' and required an explanation of their meaning to be given to the lords of session.

causes due to Crichton's current infirmity.<sup>117</sup> Two weeks later Crichton was dead.<sup>118</sup> Master John Shairp represented both the king's advocate and the comptroller in an action on 23 June and then, on 26 June, in a case of nonentry brought at the instance of both Borthwick and Crichton, McGill appeared for the king 'the utheris twa advocatis being decessit'.<sup>119</sup> The next day he was formally admitted by the lords as king's advocate and an ordinary lord of session.<sup>120</sup> Three years later his son, Master David McGill younger, was appointed for life as substitute and depute to his father who was described as 'his maiesties privat advocat'.<sup>121</sup> McGill younger was to enjoy all the powers which had pertained to the office of advocate substitute by the law or practick of the realm at any time in the past. These powers were by then well understood, although their exercise prior to 1560 appears to have been less formal than it afterwards became. The picture is certainly one in which a single figure dominates: that of the principal advocate.<sup>122</sup> This is in line with recent research by Michael Wasser who found that at the end of the sixteenth century the advocate, when pursuing criminal matters, normally exercised his office personally, but, when a

<sup>117</sup> Pitcairn, *Criminal Trials*, i, 101. This letter is dated at Dalkeith, 12 June 1582.

<sup>118</sup> Crichton appeared personally on behalf of the king on 20 June (C.S. 7/90 fol. 259r) and 22 June (C.S. 7/90 fols. 275r-v). It would appear that he died suddenly certainly before 26 June, possibly on the evening of 22 June.

<sup>119</sup> C.S. 7/90 fols. 280r, 301r-v. McGill's appearance in this case was probably still in the capacity of substitute advocate. On the career of Shairp see M.H.B. Sanderson, *Mary Stewart's People* (Edinburgh, 1987), 22-33.

<sup>120</sup> C.S. 1/3/1 fols. 174r-v. McGill was admitted on 27 June although the royal letters by which he was admitted were subscribed the day before. Unlike Crichton, McGill does not appear to have waited until his predecessor was buried before replacing him!

<sup>121</sup> (S.R.O.) P.S. 1/53 fol. 59v: 31 October 1585. I am indebted to Mr. Robin MacPherson, Dept. of Scottish History, University of Edinburgh, for this reference.

<sup>122</sup> Examples of substitutes for the king's advocate in the early seventeenth century are given in Pitcairn, *Criminal Trials*, where in place of Master Thomas Hamilton can be found Master Robert Linton (January, 1601) and Master Robert Foulis (July, 1611): Pitcairn, *Criminal Trials*, i, 337, iii, 201.

depute did occasionally appear in his stead he did so as an aid rather than a substitute.<sup>123</sup>

Arguably the appointment of Spens as joint advocate with Lauder in 1555 is not as revolutionary as it appears. In practice, he was fulfilling the same basic function as had other men of law in the past whenever the advocate was absent or otherwise unable to act. The only differences were that Spens was formally installed by the queen as one of her advocates in his own right, he was in receipt of a pension, and his appointment was not merely temporary. Moreover, Spens' appointment coincided with a period when the Regent, Mary of Guise, was seeking to restore order in the country.<sup>124</sup> That she was prepared to experiment is clear from her willingness, under the influence of French humanist ideas, to set up royal lectureships, one of which was in law.<sup>125</sup> More generally, the promotion of Spens also occurred at a time when the legal profession was beginning to expand significantly. In 1549 the number of general procurators before the College of Justice was still only nine.<sup>126</sup> Six years later the number had increased to fourteen.<sup>127</sup> The Edinburgh tax-roll of September 1565 mentions twenty-six men of law who were burgesses, although this includes writers to the signet.<sup>128</sup> By 1586 there were fifty advocates in the Court of Session and in July 1590 the lords declared that they would only allow new admissions of advocates upon

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<sup>123</sup> Wasser, *Central Criminal Courts*, 106. It is difficult to be certain what the distinction between an aid and a substitute means in this context. 'Aid' may connote a subordinate rather than merely a replacement and this would appear to fit the general trend in appointing advocates-depute even though the phrase 'substitute advocate' was still used in James VI's reign.

<sup>124</sup> Wasser, *Central Criminal Courts*, 127.

<sup>125</sup> *R.S.S.*, iv, no. 3144; J. Durkan "The Royal Lectureships under Mary of Lorraine" 1983 *S.H.R.* 73-8. The first lecturer was Master Alexander Sym for whom the town council of Edinburgh constructed a 'powpet' (lectern) in the Magdalene chapel: *Edin. Burgh. Recs.*, ii, 251.

<sup>126</sup> *A.D.C.P.*, 584.

<sup>127</sup> *C.S.* 6/29 fol. 4v. (13 November 1555).

<sup>128</sup> M. Lynch, *Edinburgh and the Reformation* (Edinburgh, 1981), 377.

the death of one of those fifty.<sup>129</sup> This expansion began in the 1550s when the rate of admission of qualified candidates significantly increased; the old system of the king's advocate simply constituting his own substitutes before leaving Edinburgh may have been less well suited to circumstances in which there was a proliferation of advocates plying their trade.<sup>130</sup> Moreover, although difficult to quantify in absolute terms, the business of the courts and that of the king's advocate appears to have grown significantly as the sixteenth century progressed and it is against this background that the change of practice during the minority of Queen Mary should be seen.<sup>131</sup>

### **Co-operation with the financial officials**

It was not unusual for both the comptroller and the treasurer to represent the interests of the crown in judicial matters during the minority of James IV. In 1532 the tabular was ordered to table all summonses pertaining to the king's profit as required by the treasurer and the advocate.<sup>132</sup> Financial officials often appeared on the king's behalf in litigation relating to their area of fiscal responsibility.<sup>133</sup> Such appearances normally

<sup>129</sup> *Scottish Notes & Queries* (1st series), x, 140; E.U.L. La. III.399 fol.116. The list from 1586 contains 55 names. Two of the advocates mentioned were dead, two were commissaries and one had become a bishop, leaving 50 potentially active advocates.

<sup>130</sup> There are numerous examples of admissions in the 1550s: Alexander Sym was admitted on 13 November 1555 (C.S. 6/29 fol. 4v), John Moscrop on 20 November 1555 (C.S. 6/29 fol. 6v), Master John Dunbar in July 1557 (C.S. 6/29 fol. 50r), in November 1557 Master George Crichton (C.S. 6/29 fol. 55r).

<sup>131</sup> The increase in business can be demonstrated in several ways. The increased size of the records of court cases - over and above changes that may have occurred in the detail in which the clerks recorded them - is the most obvious sign. The increased tendency for courts to spend days at the end of each session simply continuing cases to be heard at the next session indicates how busy they were. Thus in December 1540 the lords continued a summons of error at the instance of the king's advocate until after Christmas and ordered that it 'run our [over] becaus of gret besynes now ado quhill thai mycht gett oportunitie to discuss the samyn in the next sete of sessioun': C.S. 6/14 fol. 55v.

<sup>132</sup> *A.D.C.P.*, 378. The tabular (see chapter five), was the person responsible for arranging summonses in a table for administrative convenience.

<sup>133</sup> On the treasurer generally at this period see A.L. Murray, 'Financing the Royal Household: James V and his Comptrollers, 1513-1543', in *The Renaissance and Reformation in Scotland*, (edd.) I.B. Cowan and D. Shaw, (Edinburgh, 1983), chapter 3.

coincided with sittings of the lords auditors of the exchequer (usually held in June, July and August) but this was not always the case.<sup>134</sup> Thus in July and August 1516 the comptroller, Sir Alexander Jardine of Applegarth, appeared several times on the king's behalf.<sup>135</sup> In December of the same year Jardine's successor, Robert Barton of Over Barnton, represented the king in a case concerning the withholding of the burgh customs of Elgin and defrauding of the Perth customs.<sup>136</sup> The treasurer, Master John Campbell, appeared for the king in March 1524.<sup>137</sup> The following day, in a case concerning unpaid fines imposed in a justice ayre, the treasurer's clerk, Master James Currou, appeared for the king.<sup>138</sup> In December 1527 Barton appeared together with the king's advocate against John Moncur and his wife.<sup>139</sup> This action concerned a claim by the latter to land held in ward and nonentry by the king. Otterburn appeared for the king whereas Barton appeared in his own right as comptroller. In July, 1540, Master Henry Balnavis appeared as advocate to the king in an action concerning the escheat of goods which had belonged to a man who had died without being legitimated.<sup>140</sup> The goods in question, having been inventoried, were delivered to

<sup>134</sup> As A.L. Murray points out (*Exchequer and Crown Revenue*, 35), the audit customarily occurred at this time, following the Whitsunday term in mid-May; however practice was not always consistent. In 1520, for example, the audit was undertaken from October to December.

<sup>135</sup> C.S. 5/28 fols. 4r, 21v. Jardine is recorded as comptroller in March and August, 1516, and accounted on 26 September: Murray, *Exchequer and Crown Revenue*, Appendix, 103.

<sup>136</sup> C.S. 5/28 fol. 53v. Just four days later Barton appeared in his own right in an action against Philip Galteret, a merchant of Florence, challenging the judges' competence to hear the case between them. The lords ordained that the case continue with the Admiral in attendance on the bench: C.S. 5/28 fol. 57v, 59r.

<sup>137</sup> C.S. 5/34 154v. This appearance may be in the context of the Exchequer. It is clear that the lords auditors of the Exchequer were sitting on 4, 5 and 7 March. The Exchequer was also sitting on 13 April. These sittings were all '*in domo cancellarii*' but it is unclear whether other sittings around this time were of council or of exchequer: on the difficulties of making this differentiation, see Athol L. Murray, "Exchequer, Council and Session, 1513-1542" in Janet Hadley Williams (ed.) *Stewart Style 1513-1542: Essays on the Court of James V* (East Lothian, 1996), 100-101.

<sup>138</sup> C.S. 5/34 fol. 156r. Currou, customar of Banff (*E.R.*, xiv, 341; xv, 275) was described as a treasury clerk in 1522 (*T.A.*, v, 241). He also appeared in the king's name in February 1523: C.S. 5/33 fol. 174v.

<sup>139</sup> C.S. 5/38 fol. 62v.

<sup>140</sup> C.S. 6/13 82v. The dead man was William Hume, alias 'sueit will'. This is not the only reference to Balnavis appearing 'in our soverane lordis name': e.g. C.S. 6/11 fol. 215r (13 March 1539).

Balnavis as treasurer's clerk. This case arose on a day when Lauder, the king's advocate, was present in court and Balnavis was clearly not usurping his role: his presence, despite the misdescription of him in the record, may be attributed solely to his role as clerk to the treasurer.<sup>141</sup> John, abbot of Paisley, Queen Mary's treasurer, represented her in an action against Patrick, Earl Bothwell, concerning one of the queen's ships.<sup>142</sup> David Wood, the comptrollar, was present together with Lauder, the advocate, and Master David Ramsay, the custumar of Edinburgh, in an action before the lords auditors of the exchequer in August 1541 which concerned, amongst other things, the burgh customs of Dundee.<sup>143</sup>

Although these financial officials did appear on the king's behalf, their authority to do so appears to have been circumscribed. Only matters affecting their responsibility, actions arising directly from the audit or, at other times, indirectly from the general administration of their offices, appear to have come within their competence.<sup>144</sup> For example, in 1532 the widow of John Ayton, the king's master mason, brought an action against the treasurer, Robert Barton, which led to her obtaining payment of twenty pounds owing to her late husband's estate.<sup>145</sup> The comptroller in 1541, David

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<sup>141</sup> For Balnavis, man of law, judge and leading Protestant, see *The Works of John Knox*, (ed.) D. Laing, vol. 3, (Edinburgh 1846-64), 405ff., and also chapter three above. The position of treasurer's clerk was obviously a solid foundation for success in later life with Thomas Marjoribankis being an earlier incumbent: *T.A.*, vi, 327: 4 June 1536.

<sup>142</sup> C.S. 6/28 fol. 52r.

<sup>143</sup> C.S. 6/16 fols. 134r-136r. The clerk of the coquet of Dundee was also involved in this case in regard to a complaint made to the king that the burgh had been 'hevely done to & heryit'.

<sup>144</sup> Murray, (*Exchequer and Crown Revenue*, 205), states that the comptroller acted as pursuer in cases before the council affecting the crown revenue. To a certain extent this would overlap with the advocate's competence in, for example, actions of error, which were normally brought by the advocate but not always or, at least, not exclusively. This is developed *infra*. The advocate by himself could bring actions relating to economic matters, for example, importing salt from France against the king's inhibition and selling it to the lieges in contempt of royal letters: C.S. 6/16 fol. 136v. It is possible to find cases where the comptrollar pursued actions of deforcement in the king's name where the officer deforced was seeking to collect the king's maills: e.g. C.S. 5/28 fol. 21r-v.

<sup>145</sup> C.S. 6/1 fol. 87v.



Wood, brought an action against Thomas Davidson who was importing English cloth and other goods at the port of Leith without paying customs to the customar of Edinburgh. He was also engaged in sending merchandise the other way 'uncustumat & als without coquete'.<sup>146</sup> Moreover, it was the then comptroller, Robert Barton, together with John Beaton of Creich, the king's chamberlain in Fife, who brought an action against the aptly named John Gardner in 1523.<sup>147</sup> Gardner was pursued for repayment of his fee paid to him for tending the yards at the royal residence at Falkland and for non-payment of duties which he owed the crown as a concomitant to the 'office of gardnarschip' which he held and which, it was held, he had failed to fulfil.

Although in theory their roles were different, it can occasionally be difficult to distinguish from the record why the treasurer appears in some cases and the comptroller in others. In an action to recover maills and duties owing to the king but wrongfully detained, the advocate and the comptroller both appeared on the king's behalf.<sup>148</sup> The following month, a lease of certain lands held by Adam Reid during their nonentry, which had been invalidly assigned by a previous treasurer, was reduced by the current treasurer. A previous decret, by which Adam had prevented Thomas Corry from taking the maills of the said lands, was reduced. The distinction to be drawn must be that the latter case involved nonentry, which was the treasurer's responsibility, whereas the earlier case must have related to sums payable directly to

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<sup>146</sup> C.S. 6/15 fol. 143r. There are numerous examples of actions involving both the treasurer and the comptroller.

<sup>147</sup> C.S. 5/34 fol. 37r.

<sup>148</sup> C.S. 5/32 fol. 2r.



the comptroller by crown tenants.<sup>149</sup> There are also hybrid cases in which the king's advocate was involved along with the comptroller or treasurer.<sup>150</sup> Sometimes in such cases the advocate acted specifically as procurator for the financial officers, at other times they functioned independently.<sup>151</sup> There appears to be no reason in the majority of cases why both the advocate and the comptroller or treasurer should appear together. However, it was possible in some cases that both the treasurer (or comptroller) and the advocate might have separate interests in the same action. For example, in July 1546 the advocate appeared and desired that he be summoned to appear along with the treasurer in an action that had been brought by John, Lord Glamis against James Kirkcaldy of Grange (himself a former treasurer) concerning the reduction of private contracts between them. The queen's legal and financial interest in the matter rested on the fact that Kirkcaldy was under summons for treason, having been involved in the murder of Cardinal Beaton.<sup>152</sup> In spite of this clear interest, however, the lords ordered that Glamis should be permitted to pursue his action on his own even though the advocate had claimed it was prejudicial to the queen's interest.<sup>153</sup> Glamis, having raised his summons first, was permitted to continue with his action on his own because it had already commenced and pre-dated the summons for treason. There is some irony in Kirkcaldy's position. When he was treasurer in 1539 the former advocate Adam Otterburn, then warded in Dumbarton castle, found

<sup>149</sup> C.S. 5/32 fol. 37v; Murray, *Exchequer and Crown Revenue*, 206.

<sup>150</sup> See also the supplication by Walter Gourlay mentioned in chapter five, fn. 245.

<sup>151</sup> The comptroller often brought actions in which he was represented by a man of law other than the advocate in court: e.g. C.S. 5/34 fol. 174r where Master John Chisholm represented Robert Barton in an action brought against the custumar of Cupar in relation to a debt of £50 owed to the comptroller in the king's name.

<sup>152</sup> C.S. 6/21 fol. 17v. On Kirkcaldy of Grange and the assassination of Beaton, see Sanderson, *Cardinal of Scotland*, (Edinburgh, 1986), 184, 223. Grange's son, William, was directly involved in the murder.

<sup>153</sup> Presumably the prejudice was financial; if Kirkcaldy stood to lose financially against Glamis, then the queen would lose financially in the event of his forfeiture.

himself in debt to him having been forced to pay a large fine to the crown.<sup>154</sup> Otterburn himself had pursued the treasurer, Archibald Douglas of Kilspindie, for treason in 1528 and with Kirkcaldy now accused of treason events had come full circle.

Generally co-operation between the crown advocates and crown financial officials appears to have been close.<sup>155</sup> This reflects the fact that the advocate was the obvious source of advice on the law and legal procedure for those seeking to uphold the king's lawful interests in the economic sphere. By giving such advice the advocate could occasionally help himself. In January 1499 James Henryson brought an action against the sheriff of Stirling in respect of a sum owed by the latter to the treasurer which had been assigned to the advocate in part payment of his yearly pension.<sup>156</sup> The relationship between advocates and accountants also manifested itself procedurally. In Balfour's time it was a rule of law that in any case where the king had special interest lawful warning to the king's advocate was sufficient and the comptroller need not be warned separately.<sup>157</sup> It is probable that this was a rule of long standing. In 1525 the comptroller complained to the lords that since neither he nor the advocate had been lawfully summoned to an action no process should be led against them; the implication is that warning to one would suffice as warning to the other.<sup>158</sup> On the

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<sup>154</sup> C.S. 6/11 fol. 142r (16 February 1539). Nichol Cairncross, burgess of Edinburgh, became caution that Otterburn would pay £1000 to Kirkcaldy of Grange, the treasurer. Otterburn was then put to liberty on condition he passed to Fife and remained there at the king's pleasure. See also Inglis, *Otterburn*, 69.

<sup>155</sup> In 1508 James Henryson was even commissioned and sworn to the office of 'balzery' to the Treasurer: C.S. 5/19 fol. 327v. It is not clear what this position of 'bailie' entailed although there is no evidence that it was anything other than temporary.

<sup>156</sup> *A.D.C.*, ii, 324. No doubt this was administratively convenient for the treasurer who did not himself have to pursue the matter legally.

<sup>157</sup> Balfour, *Practicks*, ii, 296.

<sup>158</sup> C.S. 5/35 fol. 111v.

other hand in raising an action against the king it would appear that pursuers were at liberty to bring their case against both the advocate and the comptroller. Thus, by a general act at the beginning of Mary's reign, the lords ordered that any party who had been dispossessed of their heritage, tacks or steadings by royal officers or servants during the time of James V should, for the benefit of the late king's soul, have privilege in the calling of any summons they raised against the king's comptroller and his advocate.<sup>159</sup>

### **The primary activities of the advocate**

Close co-operation between the advocate and the crown's financial and administrative officials was essential because of the matters which the advocate was required to investigate and pursue on the crown's behalf. The clearest general example of this co-operation was the search conducted into records of heritable titles during the reign of James IV which formed the necessary background to the large number of actions of recognition brought on the king's behalf during his reign.<sup>160</sup> Recognitions tend to arise more rarely in the reign of James V, but actions relating to the casualties of nonentry and ward were increasingly common and also required familiarity with government records.<sup>161</sup> Co-operation was such that in 1540 the advocate was in a position to bring actions for debts owed to the crown which had been incurred over fifty years earlier.

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<sup>159</sup> C.S. 7/1/1 fol. 177v.

<sup>160</sup> According to Nicholson there were at least 149 such actions during the personal reign of James IV: R. Nicholson, 'Feudal Developments in Late Medieval Scotland', (1973), J.R., 17.

<sup>161</sup> On nonentry and ward see the summary by G.L. Gretton, 'The Feudal System', in K.G.C. Reid (ed.) *The Law of Property*, (Edinburgh, 1996), paras 75, 81. Henceforth, "Gretton, 'Feudal System'". That the right to nonentry or ward was viewed as a commercial commodity is clear from the fact that normally the advocate represented the king and also spoke on behalf of the king's donatar and both the king and his donatar appeared in the libel.

For example, the successor of Alexander Dunbar of Cumnock, Sheriff of Elgin and Forres, who had rendered his accounts in July 1489, was pursued by the advocate on the treasurer's behalf for sums owing and unpaid since that time.<sup>162</sup> Shortly thereafter the successor of Thomas McClellane of Bombie, custumar of Kirkcudbright and Wigtown, was pursued for the arrears which his predecessor had owed to the comptroller in 1506.<sup>163</sup> In order to bring actions for what in fact were modest amounts of money, careful scrutiny of the exchequer rolls was required and this no doubt was carried on by the treasurer and his clerks. That such care was taken not only indicates the king's perennial need for money, but also that such cases functioned as deterrents to those tempted to delay rendering accounts.<sup>164</sup>

It would be misleading, however, to obscure the primary activity of the advocate by considering only its financial consequences, particularly because the king's interest in most cases could be defined in monetary terms. A good example of this distinction occurred in 1518 in the context of an action brought by the king and his mother against James Murray of Falahill.<sup>165</sup> The charge concerned the alleged convocation of lieges by Murray in contempt of the king's authority.<sup>166</sup> There seems to have been

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<sup>162</sup> C.S. 6/14 fol. 53v:10 October 1540. The debt in question was alleged to be £32 15s. Compare *E.R.*, x, 84-5, where the sum of the debts in question actually amount only to £32.

<sup>163</sup> C.S. 6/14 fol. 62v. The arrears sought amounted to £60 3s 4d. This was the level of arrears in 1507 (*E.R.*, xii, 472); however, the clerks appear not to have noticed that the arrears actually increased the following year to £90 13s 4d (*E.R.*, xii, 598).

<sup>164</sup> The descendants of higher officials such as the comptroller or treasurer were not exempt from such actions; e.g. George, the son and heir of George Robison, erstwhile comptroller, was pursued for debts owed to the king by his late father: C.S. 5/17 fol. 15v.

<sup>165</sup> C.S. 5/30 fols. 185v-186v.

<sup>166</sup> It was alleged that Murray and two hundred others beset the way armed for war doing all that they could to slay a local laird whom the queen had appointed captain of her castle of Newark. Murray alleged that his actions were consistent with his duties as sheriff of Selkirk. He objected to certain witnesses brought by the queen, whom he alleged was the principal party against him, because they were her tenants.

some question as to who was Murray's principal adversary. From the defender's viewpoint, the standing of witnesses produced by the queen could be questioned if she were the principal pursuer. To counter this, the king's advocate argued that the action properly belonged to the king rather than the queen. This, he argued, was not due to the contempt but because if the action were successful the profit would accrue to the king and not to the queen. The rationale was financial. Yet this was secondary. Regardless of potential profit to the crown, it was incumbent on the advocate to act subject to law and he could not issue a summons without legal cause. The legal bases on which the advocate grounded his activities were varied with the majority falling into three broad categories: the defence and vindication of the king's economic rights (most readily understood by reference to the crown's interests in land); the defence of royal authority; and oversight of the administration of justice.

In terms of upholding royal authority, the two most common types of action were those concerned with deforcement of royal messengers and barratry. The complaint by messengers that they had been deforced, normally in the context of a poinding, was relatively common. In practice, once deforced, the messenger would break his wand and seek witnesses whom the advocate would later call to prove his case.<sup>167</sup> For example, from November 1528 to November 1529 there were eleven separate instances of the advocate bringing an action for deforcement.<sup>168</sup> The sentence on being

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<sup>167</sup> For example, C.S. 5/39 fol. 124r. The messenger at arms carried a red wand of office at least three quarters of a yard long, as well as a horn: *A.P.S.*, ii, c. 11 (1432). See Wasser, *Central Criminal Courts*, 105-6. For an example of a process of deforcement led before the regality court of Kilwinning, see C.S. 6/14 fol. 111r.

<sup>168</sup> C.S. 5/39 fol. 10v (26 Nov. 1528: Thomas Nevin, messenger, deforced); 79v (8 Feb. 1529: Andrew Mercer, messenger, deforced); 93v (15 Feb. 1529: John Adamson, messenger, deforced); 124r (27 Feb. 1529: Andrew Mercer deforced); 125v (1 March 1529) John Adamson deforced); C.S. 5/40 fol. 9v (15 April 1529: Robert Champnay, deforced); 13v (23 April 1529: Robert Champnay, deforced); 16v (5 May 1529: William Duncan deforced); 45v (24 May 1529: Robert Champnay and John Langlands

found to have deforced the king's officers was mandatory: escheat of all moveable goods and imprisonment for a year and a day and further upon the king's will.<sup>169</sup> The significant point about deforcement was not the degree of violence used, or indeed the degree of deforcement whether partial or whole: it was the 'contemptation' done to the king's 'auctorite riale' which mattered.<sup>170</sup> The messenger, whether herald, macer, *nuncius* or sheriff *in hac parte*, represented the king, and an affront to the king's representative was an affront to the king which the advocate was required to pursue assiduously.

Purchasing benefices at Rome without the king's licence damaged the crown in two obvious respects: firstly, it meant the transfer of a large sum of money out of the realm and, secondly, it directly challenged the royal privilege of nominating someone to hold the benefice.<sup>171</sup> Legislation against clerics negotiating directly with Rome in the purchase of benefices had existed since the reign of James I, albeit the royal privilege of nomination appears not to have been formally settled until a papal indult issued to James III in 1487 confirmed that the pope would not make provision to fill vacancies

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deforced); 46r (24 May 1529: John Langlands deforced); 137r (10 Nov. 1529: John Gourlay deforced). In the following year, to November 1530, there were no actions for deforcement.

<sup>169</sup> When James Henryson prosecuted John Lindsay of Wauchop for the slaughter of a messenger at arms the sentence was death: Pitcairn, *Criminal Trials*, i, \*49.

<sup>170</sup> The phrase 'contemptation done...to his auctorite riale' is standard in the decretet of the lords whenever they find deforcement established. There were variations in the degree of physical harm done. The allegation might be one of violent and masterful deforcement where violent hands were placed upon the officer (e.g. C.S. 6/1 fols. 35v-36r) or simply wrongful deforcement where the officer was prevented from carrying out his assigned task (e.g. C.S. 5/39 fol. 124r). The sentence was the same in either case because the same level of contempt for royal authority was exhibited.

<sup>171</sup> The cost and time involved in appeals to the Roman curia were acknowledged by Sixtus IV in the bull, *Triumphans pastor eternus*, which raised St Andrews to a metropolitan see in 1472: L.J. Macfarlane, 'The Primacy of the Scottish Church 1472-1521', *I.R.*, xx, (1969), 112 (henceforth Macfarlane 'Primacy'). In England the right to nominate a clerk to a benefice was a temporal right (an 'advowson') justiciable in the king's courts: Baker, *IELH*, 149. The issue does not appear to have been controversial; the church seems to have acquiesced in royal claims to have jurisdiction in the matter: Helmholz, *Canon Law and the Law of England*, (London, 1987), 83 (henceforth 'Helmholz, *Canon Law*').



worth in excess of two hundred gold florins of the camera for at least eight months. This gave the king (and his successors) time to make supplications on behalf of their nominees.<sup>172</sup> This privilege appears to have hardened into a right by 1526 when the estates asserted that the king had the power to nominate, rather than merely recommend, a candidate.<sup>173</sup> This may have been a further response to the practice of churchmen naming those to be promoted in Rome as their successors; the privy council had tried to end this in November 1525 because of the great damage it was doing to the king's interests.<sup>174</sup>

Although there was a degree of tension in the relationship, especially where issues such as barratry were concerned, the balance of power between the church and the crown in Scotland during the reign of James V was increasingly in favour of the king.<sup>175</sup> In a supplication which he made to the lords in December 1529 the king's advocate took it for granted that the king and his predecessors had had the right of granting provision to all vacant benefices in any diocese of the realm.<sup>176</sup> It was precisely the king's desire to protect both his income and his rights *vis-à-vis* Rome which explains why disputes concerning benefices so rarely appeared before the courts of the official but were so regularly raised by the king's advocate before the

<sup>172</sup> I.B. Cowan, 'Patronage', 75; Macdougall, *James III*, 229. For lay patronage see Macfarlane, *Elphinstone*, 211ff. See also *A.D.C.P.*, introduction, xlviii-lv.

<sup>173</sup> W.C. Dickinson, *Scotland from Earliest times to 1603* (ed. A.A.M. Duncan, Edinburgh, 1977), 274; Cowan, 'Patronage', 76. According to Macfarlane, 'Primacy', 115, James III by 1478 was able to override papal provisions at will and that the privilege granted in 1487 soon became a right.

<sup>174</sup> C.S. 5/35 fol. 165r (23 November 1525).

<sup>175</sup> The concessions granted to the crown in relation to the endowment of the College of Justice are one indication of how the balance of power lay during the reign of James V. The papacy certainly feared an attack on church property in Scotland and preservation of the liberty of the church was in Cardinal Beaton's view a paramount consideration: Sanderson, *Cardinal of Scotland*, 86.

<sup>176</sup> C.S. 5/40 fol. 150v. It must of course be remembered that statements by the king's advocate are nowhere free of political propaganda on behalf of the crown.



lords of council.<sup>177</sup> The rights of the king's nominee were subordinated to the interests of the king in stamping out barratry and that is why such actions proceeded at the king's instance in the king's court.<sup>178</sup> Moreover, there is evidence that the parties, left to themselves, were keen to avoid litigation if possible.<sup>179</sup>

As a symptom of the tension between crown and papacy, barratry had the potential to divide the loyalties of the spiritual lords of session. In 1522, for example, there was a dispute between Master John Sauchy and the king's secretary concerning the fruits of the parsonage of Eddleston in Tweeddale. Sauchy had obtained executorials in Rome which he sought to exercise; however, the secretary questioned his right to do so and alleged that he himself had been provided to the benefice. The bishop of Aberdeen, although as president of the court he had read out the summons, refused to question Sauchy's executorials and dissented from all things that were in prejudice of his conscience or that may have incurred any legal process against him from the pope.<sup>180</sup> Such reticence from a lord of session was unusual. Just as unusual was the fact that the secretary then brought the official of St Andrews before the lords to reinforce his case. The official stated that he had convened in the archdeanery of Lothian with 'certaine advocatis & men of law' and that together they had considered Sauchy's

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<sup>177</sup> Ollivant, *The Official*, 83-4; 126.

<sup>178</sup> There is a parallel with the situation in England where from the end of the fifteenth century an increasing number of cases based on the Statute of *Praemunire* of 1353 were being brought. This statute primarily sought to deter litigation affecting the king from being heard in church courts and the actions based upon it have been interpreted as an attack on ecclesiastical jurisdiction: Helmholz, *Canon Law*, 317 and his *Roman Canon Law in Reformation England* (Cambridge, 1990) 25-7. At the period of this study *praemunire* was the live issue in England and, indeed, was the means by which Wolsey was removed from power: J. Baker, *The Reports of Sir John Spelman*, ii, (Selden Society, 1978), 66-70; Richard Marius, *Thomas More* (London, 1984), 126-7; Peter Gwynne, *The King's Cardinal*, (London, 1990), 623ff.

<sup>179</sup> Cowan, 'Patronage', 86-7.

<sup>180</sup> C.S. 5/33 fols. 85v-86r. Sauchy also features in a barratry case pursued by James Wishart early in the reign of James V: *A.D.C.P.*, 29ff.

executorials and were of the opinion that the secretary had been justified in appealing from them and that they were willing to have this opinion added to the end of his appeal.<sup>181</sup> The most singular aspect of the case is that although Sauchy was alleged to have contravened the acts of parliament against barratry, the king's advocate does not appear from the record to have been involved at any stage.

The record, however, does display a regular stream of actions brought to enforce the statutes against barratry.<sup>182</sup> A good example is the action raised by the king's advocate in October 1528 against the sub-prior and convent of Holyrood and dean John Lamb, canon of the same, for their 'hie presumptioun' in attempting to present the latter as prior of St Mary's Isle in Kirkcudbrightshire, contrary to the king's nomination and in prejudice to the privilege of his crown.<sup>183</sup> Three months later an action was concluded against Dean David Murray for purchasing the priory of Beaulieu in Rome after the king's familiar chaplain, Master James Haswell, had been provided to the same by the king who had sent the pope 'his effectuiss writingis for his [i.e. Haswell's] promotioun to the said priorie be vertu of rycht and privelege of his croune'.<sup>184</sup> The temporal lords of council declared that Murray and his accomplices were traitors who had broken the acts concerning barratry and should be put to the horn and banished, never again to 'use worschip' within the realm. The drain of resources abroad through

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<sup>181</sup> C.S. 5/33 fols. 93r, 101r.

<sup>182</sup> It has been suggested that the fifteenth century statutes against barratry were motivated by concern about papal reservation of benefices, a matter that was not affected by the indult of 1487: Cowan, 'Patronage', 82; see also MacFarlane, *Elphinstone*, 212. Nonetheless in 1488 the purchasing at Rome of a benefice which belonged to the crown through the king's right of presentation *sede vacante* was brought within the statutory offence of barratry: G. Donaldson, "The Rights of the Crown in Episcopal Vacancies" reprinted in his *Scottish Church History* (Edinburgh, 1985), 38. The actions before the lords of session tend simply to refer to contravention of the acts against barratry and the precise ground is not always evident from the record.

<sup>183</sup> C.S. 5/38 fol. 184r.

<sup>184</sup> C.S. 5/39 fol. 63r.

the purchasing of benefices in Rome was condemned in one case because it hurt the 'ordinaris that may nocht benefice lordis sounis and thir awne servandis for pley of sik barratouris'.<sup>185</sup> This was a reference to the financial damage created by disputes between the king's nominee and other claimants to ecclesiastical vacancies: such disputes might engender delay in the receipt of the fruits of the benefice by its lawful holder.

### **The administration of justice**

The king's interest in the administration of justice required that his advocate became involved in pursuing those guilty of improper conduct in the king's courts. In terms of volume, the most common case of this type involved the pursuit of a summons of error based upon the allegation that a sheriff and inquest had improperly served a brieve of inquest (also known as a brieve of succession), but such summonses were also brought against other retourable brieves such as the brieve of tutory.<sup>186</sup> In proceeding upon such brieves it was the responsibility of the sheriff and local inquest to make a retour to the king's chancery answering the points of the brieve.<sup>187</sup> In the case of the brieve of succession, this involved indicating whether the last holder died vest and saised as of fee in the lands in question at the faith and peace of the king and, if so, who the nearest lawful heir of that person was and what the value of the lands

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<sup>185</sup> C.S. 5/37 fol. 239v.

<sup>186</sup> On the topic of wilful error see Willock, *The Jury in Scotland*, (Edinburgh, 1966), chapter xii. For the brieve of inquest, see *Fife Sheriff Ct. Bk.* 312.

<sup>187</sup> It would appear that the king's advocate was warned in advance of the service of brieves of inquest. In an apparently isolated judgment in 1524 the lords decerned that, notwithstanding an act of parliament produced by Wishart, the king ought not to be warned forty days before the serving of such a brieve: C.S. 5/34 fol. 115v. Two years later in another case involving a brieve of inquest the lords mentioned that the advocate should be lawfully warned to the action upon forty days notice: C.S. 5/36 fol. 7v.

was. The summons of error might be raised by the king's advocate alone or, more usually, by the advocate in conjunction with the party who felt aggrieved by the decision of the sheriff and the inquest.<sup>188</sup> The allegations raised in the summons varied but might include an accusation against the sheriff of partiality or inordinate procedure and a complaint against the inquest of manifest, wilful and/or ignorant error.<sup>189</sup> Sometimes the distinction between alleged procedural irregularity and bias was negligible and the underlying assumption in some cases appears to have been that if the judge permitted an obvious irregularity then he must have been partial and both grounds were entered in the libel.<sup>190</sup> However, there are certainly examples in which a kin relationship between the sheriff and the party seeking to have the brieve served can be demonstrated.<sup>191</sup>

Allegations of inordinate procedure might concern the judge himself, for instance that he was not of age or that he lacked a proper commission to serve the brieve,<sup>192</sup> or they

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<sup>188</sup> The original authority for bringing the action lay with an act of parliament of 1471 which allowed a party aggrieved by the malice or ignorance of an assise or inquest to bring an action to have the determination of that inquest reduced: *A.P.S.*, ii, 100 c.9. The statute does not mention the king's interest and apparently took it for granted. However it does mention that the inquest should be punished after the form of the king's laws in *Regiam Majestatem*. Arguably the king's major interest in most summonses of error lay in the fact that he was feudal superior of the lands which the summons brought into question. In so far as irregular proceedings in the king's courts were alleged, his interest lay in ensuring the correct administration of justice.

<sup>189</sup> 'Sheriff' includes here the sheriff-depute, or sheriff *in hac parte* commissioned for the purpose of serving the brieve, steward or president of the burgh court and his bailies. Even the justice clerk Nichol Crawford, as sheriff depute of Linlithgow, was not immune from having a summons of error raised against him by the advocate: C.S. 5/36 fol. 102r.

<sup>190</sup> For example, it was alleged in one case that the heir who sought to be served was within the third degree of consanguinity to a member of the inquest which had been proven by a notarial instrument on the day of the sheriff court: C.S. 5/39 fol. 20r. Partiality was much more often alleged than given as a ground of judgment.

<sup>191</sup> E.g. John, Lord Lindsay, sheriff principal of Fife and Master John Spens were allegedly related in that the sheriff's grandmother and John's mother were sisters: C.S. 5/39 fol. 122r.

<sup>192</sup> C.S. 5/39 fol. 164v: allegation that William Edmonstone of Duntreath steward of Menteith was not old enough to be a judge. C.S. 5/33 fol. 204r: allegation that William Abernethy, alleged sheriff of Aberdeen *in hac parte* by the king's commission was not sworn and did not have a lawful commission.

might relate to the manner in which the brieve was executed. A properly executed brieve was lawfully proclaimed on a market day at the market cross of the principal burgh of the sheriffdom<sup>193</sup> fifteen days in advance of the service of the heir,<sup>194</sup> provided that this did not occur during 'feriat' (vacation) time.<sup>195</sup> The brieve had to be served by a properly constituted inquest of the worthy men of the sheriffdom who best knew the truth of the matter in question,<sup>196</sup> and the seals of the majority of them had to be affixed to the retour to make it valid.<sup>197</sup> By statute the summons of error had to be raised within three years of the service of the heir;<sup>198</sup> however, the lords in certain circumstances relaxed this requirement.<sup>199</sup>

In cases where there was no lawful heir the crown took the lands as ultimate heir. An example of the king's advocate arguing (albeit unsuccessfully) that a tenement was escheat to the crown through lack of heirs occurred in December 1522 when James Wishart argued that the tenement in question was the conquest of a foreigner whose 'haile blud' had been destroyed by the death of his last descendant.<sup>200</sup> Such an argument is rarely found.<sup>201</sup> Equally rare are parties technically ineligible to be served

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<sup>193</sup> C.S. 5/39 fol. 20r.

<sup>194</sup> C.S. 5/39 fol. 170v. In one case (C.S. 5/39 fol. 164r) it was alleged that the proclamation of the day on which the brieve was to be served followed the date of the service.

<sup>195</sup> C.S. 5/39 fol. 80v.

<sup>196</sup> E.g. C.S. 5/39 fol. 80v: allegation that the inquest chosen by the sheriff depute were 'sempill persounis' and that he had 'left out barons and worthy men that best knew the verite in the said mater'.

<sup>197</sup> C.S. 5/33 fol. 27r: allegation that there were only six seals on a retour and therefore it should be annulled.

<sup>198</sup> C.S. 5/33 fol. 113r.

<sup>199</sup> E.g. C.S. 5/33 fol. 137r, where the party who had raised the summons in conjunction with the advocate had been out of the country.

<sup>200</sup> C.S. 5/33 fol. 77r. 'Conquest' here is meant in its technical sense of land acquired by purchase and not inheritance. See Gretton, 'Feudal System', para 54.

<sup>201</sup> There is an example of a successful case brought by the advocate in which the king gained the escheat as ultimate heir: C.S. 5/17 fol. 225v.

as heirs because of their personal status.<sup>202</sup> In a case concerning a brieve of tutory, Thomas, abbot of Balmerino, was not served as tutor allegedly because 'he is ane monk and deid to the warld and is nocht able thirfor'.<sup>203</sup> It was argued that Thomas, as nearest agnate, should have succeeded as tutor because by the consuetude (custom) of the realm abbots were not precluded from succeeding to the office of tutory and, further, anyone served as tutor at law could not transfer the office to another. This was still the law in Balfour's time.<sup>204</sup> Finally, confusion might exist concerning the nature of the interest held by the last occupier of the land.<sup>205</sup> Thus in one case an inquest was declared to have erred when it retoured that the lands in question were held of the king in blenchferme, although no evidence to support this had been produced.<sup>206</sup> This particular record, however, was amended when the party who had sought to have the brieve served produced a charter bearing that the lands were indeed held blench and the inquest was thereby assoilzied.

Indeed, the consequences of getting the retour wrong were potentially devastating for the members of the inquest: escheat of moveables and imprisonment for at least a year.<sup>207</sup> There are regular instances of men coming forward before the lords to

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<sup>202</sup> For instance, friar Thomas Sleich of the order of the Friars Preachers who, as a religious man, was 'deid to the warld' and so could not be served as the nearest lawful heir: C.S. 5/33 fol. 77r.

<sup>203</sup> C.S. 5/39 fol. 167r. This action was brougth by the advocate and the tutor dative of George Forrester against Alexander Forrester who had been served tutor at law, together with the sheriff deputes of Fife and the inquest who had served him.

<sup>204</sup> B.P., i, 117.

<sup>205</sup> E.g. was that interest infeftment or merely liferent?: C.S. 5/33 fol. 10r.

<sup>206</sup> C.S. 5/40 fol. 40r. There are several similar cases together in the record at this point.

<sup>207</sup> The knock-on effect of having a retour reduced was normally the casualty of nonentry and escheat of anyone who had wilfully erred. In 1530 the king's advocate, acknowledging numerous reductions of such retours in the current session, stated with the treasurer's assent 'that every man sall have the nonentres of thir saidis landis and eschetis of thir gudis': C.S. 5/41 fol. 10v. This appears to mean that the crown, perhaps in the face of protest, was prepared to renounce (at least temporarily) the major economic benefit which such actions brought. However, in the cases which follow this announcement wilful error appears to be punished as normal by escheat to the crown.



distance themselves from the final verdict of the inquest in the hope of avoiding the consequences of being found to have acted wrongly.<sup>208</sup> In one case two members of an inquest appeared with a notarial instrument as proof that they had refused to serve a brieve and that their names should therefore be removed from a subsequent decret of error.<sup>209</sup> The king's advocate immediately offered to prove that the instrument in question was a forgery. A similar case is revealed in a supplication to the lords made by Charles Thornton who had been warded having been convicted of error whilst acting on an inquest.<sup>210</sup> His warding occurred despite the fact that his procurator had produced a notarial instrument stating his refusal to serve on the inquest because of his belief that the party seeking to serve the brieve was too young to be validly retoured as heir. Thornton had been escheated despite the fact that his procurator, Henry Spittall, had not had an opportunity to prove his allegation. The lords suspended this escheat, however, when another procurator for Thornton, Robert Galbraith, produced the instrument before them. The treasurer, John Campbell, who had originally claimed that the instrument was forged, then backed down and admitted that he had no reasonable cause to persist in that claim. So high were the stakes that inquests, or some members of them like Thornton, sometimes had a man of law to represent them.<sup>211</sup> Thus Thomas Marjoribankis, procurator for bailies and an inquest who had been summoned for error, asked for the formal recording of a concession by

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<sup>208</sup> E.g. C.S. 6/14 fols. 92r-v, 111r: Patrick Maxwell, alleged to have been a member of an inquest, claimed that he was not present when a retour was made, that his seal was not affixed to it, and that it had been irregularly issued from the chancery. However the majority of the seals of the inquest were on the retour and the lords found it adequate, although ignorantly arrived at by the inquest.

<sup>209</sup> C.S. 5/40 fol. 65v.

<sup>210</sup> C.S. 5/36 fol. 84v.

<sup>211</sup> Generally speaking the sheriff or sheriff depute would appear personally, or employ a man of law to act for them, to defend themselves against a summons of error whereas it was much rarer for members of the inquest to appear or be represented. Presumably they left it to the presiding sheriff to vindicate the retour before the lords of session.



the treasurer and the advocate that if he could prove within a week that his clients had not erred then they would incur no danger.<sup>212</sup>

The potential consequences of error were equally serious for the sheriff. It was the responsibility of the sheriff to maintain an adequate record of processes led before him so that he might answer for his conduct.<sup>213</sup> The leading action of this period was that raised by the king's advocate against John, Lord Lindsay of the Byres, sheriff principal of Fife and his deutes for alleged inordinate proceeding in sheriff courts held on 19 October 1526 and 28 March 1528 in the refusal to serve Robert Orrock to the lands of Orrock.<sup>214</sup> Orrock had obtained letters charging the sheriff to serve him as heir under the threat of losing his office.<sup>215</sup> Both Lindsay and his deutes lost their offices perpetually during the king's will, according to the terms of an act of parliament which defined the penalty for those guilty of the partial administration of justice.<sup>216</sup> The sheriff principal was ordered to deliver his court books, rolments and seal or signet of office within three days on pain of rebellion<sup>217</sup> and, once delivery was made, the king's advocate made it clear that no value should be ascribed to any books other than those delivered.<sup>218</sup> The following day the lords ordered that the court books

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<sup>212</sup> C.S. 5/40 fol. 87r.

<sup>213</sup> C.S. 5/33 fol. 124r: dispute re the court books, seal of office and signet of the sheriff principal of Perth, William, master of Ruthven, who was responsible for answering for all processes led by himself or his deutes.

<sup>214</sup> C.S. 5/39 fols. 67v, 120r, 122r; C.S. 5/40 fols. 49r-50r, 55r, 68v, 69r, 70v, 129r; 155r. These references include some of the other complaints against Lindsay which occur at this period, especially following his loss of office.

<sup>215</sup> C.S. 5/40 fol. 49r. Orrock also had other letters which the sheriff's deutes had refused to obey. For a list of the sheriff deutes of Fife, see C.S. 5/39 fol. 122r.

<sup>216</sup> C.S. 5/40 fol. 50r.

<sup>217</sup> C.S. 5/40 fol. 55r. Lindsay asserted that he used no seal or signet of office but used his own seal instead.

<sup>218</sup> C.S. 5/40 fol. 68v.

be handed over to the king and delivery to the advocate in his name then took place.<sup>219</sup>

Lindsay was replaced by the earl of Rothes.<sup>220</sup>

An interesting, albeit less serious, dispute arose in 1523 concerning the sheriff clerkship of Perth.<sup>221</sup> In pursuit of his claim to hold this office Alexander McBrek purchased royal letters seeking delivery from the sheriff, William, Master of Ruthven, of the court books, seal and signet of office. The lords annulled these letters because they had been purchased without cognition; nonetheless the significant aspect of the case is that McBrek requested the king's advocate to procure for him because he had the king's letters and Ruthven stood opposed to him. The advocate, although present, was not drawn into the case but it is nonetheless instructive in demonstrating how a man who believed himself to be an office holder clearly thought it was his right to be represented and defended by the king's advocate simply on the strength of letters purchased from the king's chancery. In this context it is worth mentioning briefly that the advocate did sometimes appear for the officials and appointees of the king other than the treasurer and the comptroller. A good example occurred in 1541 when Henry Lauder appeared for Robert Orrock in the latter's capacity as depute to the King's master of work. Orrock was responsible for building a harbour at Burntisland in Fife and his action was brought against two workmen ordering them to appear for work or else to be put to the horn.<sup>222</sup>

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<sup>219</sup> C.S. 5/40 fol. 69r.

<sup>220</sup> C.S. 5/40 fol. 155r. This, at least, was subject to any appeal by Lindsay. However, Rothes was still exercising the office in 1541: C.S. 6/14 fol. 94v. Moreover, Cameron suggested that Lord Lindsay sought to win royal favour, and the return of the sheriffship, by serving on the assize which convicted Hamilton of Finnart of treason in 1540: Cameron, *Personal Reign*, 374.

<sup>221</sup> C.S. 5/33 fol. 124r.

<sup>222</sup> C.S. 6/15 fol. 55v. Orrock, as any official could, did appear for himself: e.g. C.S. 6/15 fol. 139v.

One of the most remarkable attributes of the king's advocate was that, even when present in person, it appears he could safely ignore what was going on around him without fear of prejudicing the king's interests. This follows from the proposition put forward by Adam Otterburn in November 1532 that, as king's advocate:

'in all tymes tocum his taciturnite at the bar suld nocht be preiudiciale to the kingis actioun bot that his hienes may persew sic actiounis quhen his grace thinkis maist expedient'.<sup>223</sup>

In other words the initiative in pursuing the king's matters was to lie with the king's advocate and parties could not rely on the argument that if the advocate were present and made no protest then he should lose any right to do so later. The matter arose in the context of an action of error raised by the king and the master of Glencairn against Hugh Campbell, Sheriff of Ayr.<sup>224</sup> William and Hugh had both consented to a continuation of the case without informing the advocate, as the latter declared to the king. In response the king wrote to the lords of session demanding that the summons, which should have been heard on the preceding Friday (the king's day), should be heard immediately and condemning 'collusion' between the other parties to the detriment of his interests.<sup>225</sup> The matter was heard and the advocate, having had his point upheld, then agreed to a continuation of the case.<sup>226</sup> That advantage had in the past been sought by litigants from the silence of the king's advocate is clear by

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<sup>223</sup> C.S. 6/2 fol. 7r.

<sup>224</sup> This is yet another stage in the dispute over the lands of Loudoun between the King, the earl of Moray, Hugh Campbell and his mother Isobel Wallace, and the master of Glencairn. The dispute appears to date back to the death of Isobel's husband Hugh Campbell in 1508. The dispute was briefly mentioned above in relation to Robert Galbraith's special consitution as king's advocate, see fn. 83 above.

<sup>225</sup> C.S. 6/2 fol. 6v. As was pointed out in chapter four, Friday was set aside in 1532 as the day on which were called summonses in which the king had an interest. Although this was the general rule, it was not always adhered to and such cases were called on other days particularly Wednesdays.

<sup>226</sup> C.S. 6/2 fol. 7v.

reference to events in the sheriff court of Berwick, sitting in Edinburgh's Tolbooth in June 1518. A brieve of inquest was served and a retour made by the sheriff depute in favour of William Manderstone in the presence of *inter alia* the earl of Arran, the treasurer and the king's advocate. William's prelocutor Robert Leslie, in making the specific point that the advocate produced no evidence to impede the service of the brieve, seems to have hoped thereby that personal bar might operate to prevent him from doing so in future.<sup>227</sup> Despite Otterburn's success in arguing his point in 1532, it was probably safer in general terms for the advocate to speak rather than remain silent. Henry Lauder was certainly prepared to state that he was not willing to act, when invited by a defender to do so, until he had been further advised.<sup>228</sup>

In terms of the administration of justice the advocate may not only have been responsible for overseeing the king's judicial appointees; one case exists which suggests it was his role to enforce ethical standards within the legal profession. This was an action brought by Henry Lauder as king's advocate against his fellow man of law Master George Strang. Strang was an established lawyer having been appearing before the court since the mid-1530s. The accusation against him related to his conduct whilst representing John Ramsay of Dunure. Lauder alleged that Strang had stood with his client and sustained a false instrument and charter.<sup>229</sup> Strang consistently denied that he knew of the falsity of either document. Indeed he stated that 'he defendit na thing that is fals nor will nocht defend bot allanerly for defence of

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<sup>227</sup> *Prot. Bk. Stathauchin*, no. 295: 29 June 1518. Adam Otterburn appears in the witness list. An objection to the brieve was made by a certain Philip Nesbit of that ilk for his own interest.

<sup>228</sup> C.S. 6/14 fol. 105r.

<sup>229</sup> C.S. 6/28 fol. 24v.

his client in his just actioun'.<sup>230</sup> Strang had alleged that a copy of the instrument in question was recorded in the protocol book of Sir John Galloway. Producing Galloway's protocol book, Lauder stated that no such instrument could be found inside it; Strang's response was that this proved nothing because Sir John had had more than one protocol book.<sup>231</sup> The conclusion of this action does not appear in the record however it is likely that Lauder failed to make his charge stick because Strang soon re-appears acting for other clients.<sup>232</sup> More important is the fact that the action was brought by the king's advocate at all. It indicates a concern on the part of Lauder to ensure that professional ethics were maintained. Had Strang knowingly used falsified evidence on behalf of his clients clearly he would have broken the *oath de calumnia* as well as the act of sederunt laid down by the lords in May 1532.

The production and use of false notarial instruments is not often established in the record although allegations of such misconduct do appear regularly.<sup>233</sup> The king's advocate was required to summon notaries to appear before the lords to answer such allegations. In December 1540 an act of parliament warned that the traditional punishments would be applied rigorously to false notaries and to those who made or knowingly used false instruments.<sup>234</sup> This last point is important: not all false

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<sup>230</sup> C.S. 6/28 fol. 26r. To "wittandlie" use a false document was a serious matter: *A.P.S.*, ii, 360.

<sup>231</sup> C.S. 6/28 fol. 34r. The dating of this entry is difficult to determine. It clearly belongs to 22 February although the year is not given; the earlier entry belongs to 13 May 1549 (fol. 24v). Either folio 34r belongs to February 1550 or it has been inserted in the wrong place in the volume and should be attributed to February 1549 (thus placing it chronologically prior to folio 24). Whichever date, the sense of the entries is clear.

<sup>232</sup> C.S. 6/28 fol. 36r (procurator for Sir Simon Galloway); C.S. 6/28 fol. 57v (procurator for Agnes Strang and, separately, Sir John Rais) etc. Strang appears in the list of general procurators recorded in March 1548/9 (*A.D.C.P.*, 584) underlining his status as a leading man of law at around this time. In May 1564 he replaced Thomas Kincraigie as one of the advocates for the poor: *R.M.S.*, v, no. 1690. On the role of the advocate for the poor see below.

<sup>233</sup> E.g. C.S. 5/17 fol. 151r.

<sup>234</sup> *A.P.S.*, ii, 360.

instruments were made by notaries. In 1541 for example, Patrick Colquhoun confessed before the lords that he had induced ‘an scolar’ to forge a charter and to make a seal which he used as evidence in court.<sup>235</sup> Ironically the case in which Patrick used the forged document was one in which he and the advocate sought to reduce a decreet produced by the provost and bailies of Glasgow and the inquest of their baron court. Patrick and the advocate alleged that one of Patrick’s tenants had been lawfully warned to remove prior to Whitsunday whereas the first instance court had found that no warning had been given. The lords of council assoilzied the defenders, presumably on the basis that Patrick had used false evidence, and the advocate then asked for Patrick’s confession to be recorded in the *acta*, perhaps with a view to proceeding against him criminally.

The advocate was not only responsible for producing escheats for the crown but also had to secure the evidence of exactly what had been escheated. This follows from Henry Lauder’s dealings with the Aberdeen notary James Young.<sup>236</sup> Following the execution and escheat of all the possessions, heritable and movable, of captain David Borthwick who had been convicted of heresy, Lauder required Young to extract from his protocol book the instrument of sasine by which Borthwick was infeft in the lands of Aberdour. Young refused - utterly, contemptuously and ‘with iniureus wordis’. Having been charged to compear before the lords, he was eventually ordered to deliver a copy of the instrument to the advocate.

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<sup>235</sup> C.S. 6/14 fols. 165v, 171r.

<sup>236</sup> C.S. 6/15 fol. 168r: 21 June 1541.

The practice whereby the advocate normally pursued a summons of error in conjunction with another party has already been mentioned. The same practice is found in relation to cases involving issues such as nonentry and ward where the donatar of the king's rights is normally included in the libel as co-pursuer. Normally this functioned straightforwardly as the king's assignee had as good a right as the king to raise the action and could call upon him as warrantor of the rights transferred. It appears as though renunciation of his right by the co-pursuer prior to *litiscontestatio*, however, absolved the defender from the summons in question.<sup>237</sup> The joint libel, once begun, had to be maintained once the stage of *litiscontestatio* had been reached until the case was concluded; the king's advocate could not pursue the case on his own if the co-pursuer had not by then discharged his rights in the matter.

### **Protection of the royal demesne**

A major part of the advocate's responsibility was the vindication of the king's rights to land and the preservation of crown estates. The act of Annexation of 1455 had rendered considerable areas of land part of the king's patrimony and had forbidden their alienation without the formal consent of the three estates.<sup>238</sup> The enforcement of this act took a considerable amount of the advocate's time and also indicates the extent to which this, and subsequent similar legislation, was honoured in the breach.

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<sup>237</sup> C.S. 6/15 fols. 71v-72r. This is based upon defences presented by Hugh Rigg in just such a circumstance. The point was not decided however because the court was of the view that sufficient *litiscontestatio* had been made between the advocate and the defender prior to the withdrawal of the co-pursuer. The renunciation of his right to nonentry had occurred prior to the last possible moment when the defender could have introduced peremptory defences. In other words, Rigg had produced his argument too late because he had allowed *litiscontestatio* to begin after the advocate's co-pursuer had withdrawn.

<sup>238</sup> *A.P.S.*, ii, 42. For comment, see McGladdery, *James II*, (Edinburgh, 1990), 93-5; Nicholson, *Later Middle Ages*, 378-9. The lands annexed to the crown in 1455 belonged to the Douglasses. Other lands were added later (see Nicholson, *ibid.*, 455).



Lands in Banffshire held by John, Earl of Atholl, were in 1506 decerned to pertain to the king as his property because according to the exchequer rolls the lands had been forfeited by John Douglas of Balvenie in 1455.<sup>239</sup> Similarly in 1541 a feu charter in favour of the late David Balfour of Burleigh was reduced because it related to ‘annext landis to the croune’ and was made during the king’s minority without the advice or consent of the three estates; in modern terms, it was *ultra vires*.<sup>240</sup>

Those occupying lands which were properly part of lands which pertained to the king stood in danger of eviction. Alexander Calder, possessor of lands in the earldom of Mar, found that the lands - as a pendicle of the earldom - were the king’s property and had been illegally alienated from the king’s predecessors as earls of Mar.<sup>241</sup> They might also find themselves charged with wrongful detention of maills and duties owing to the crown if they could not establish a title to the lands.<sup>242</sup>

### Other activities

In order to broaden the analysis of the activities of the advocate, four sample years have been taken into consideration, 1506, 1518, 1530 and 1541; two during periods of royal minority and two when an adult king was on the throne.<sup>243</sup> There are several limiting factors, however, which mean that the results of the sample can give no more

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<sup>239</sup> C.S. 5/18/1 fol. 53r; McGladdery, *James II*, 94. Cf. the earl of Huntly who admitted that lands in Strathearn which he possessed properly pertained to the crown.

<sup>240</sup> C.S. 6/14 fol. 162v. Another similar case refers specifically to the king’s lack of power “to set or dispone” lands that were “part of the principalite or at least annexit thirto”: C.S. 6/15 fol. 185v.

<sup>241</sup> C.S. 5/17 fol. 66v. The earldom had reverted to the crown in 1479 following the forfeiture and death of John, Earl of Mar, James III’s brother: Macdougall, *James III*, 130-33

<sup>242</sup> C.S. 5/17 fol. 65v.

<sup>243</sup> See Appendix 15. The years in question, ending with Martinmas in each year, have been chosen at random.

than very general indications of the conduct of the king's business.<sup>244</sup> The first such factor is scribal practice. Although more cases involving the advocate are noted in 1541 than in 1506, it would be dangerous merely to attribute this to an increase in the legal business before the court.<sup>245</sup> The impression is clearly given that at the end of James V's reign the clerks were more assiduous in recording court business than those of the previous generation had been. Secondly, and more importantly, the advocate was responsible for dealing with matters affecting the king's interest as and when such matters arose. Whether or not a particular matter arose might to some extent depend on government policy and the wider political circumstances of the time. For example, in times of greater political unrest instances of deforcement of royal messengers may have risen. Beyond this factor, the advocate's caseload was always extremely varied and attempts to categorise it artificially for statistical purposes would merely camouflage its diversity. Thus under the broad title 'debt actions' might be subsumed actions against crown accountants,<sup>246</sup> actions to recover crown property (anything from rents and land to silver chalices<sup>247</sup> and treasure trove<sup>248</sup>), actions to recover fines for failing to render suit and presence in royal courts,<sup>249</sup> actions to obtain customs revenue,<sup>250</sup> or even actions in which the crown as ultimate heir sought to claim as

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<sup>244</sup> The sample taken serves its major purpose: to indicate the diversity of matters affecting the king's interest. A greater sample would only be beneficial if it was fairly extensive and closely related to the contemporary political and economic background. Such a survey, however, would go beyond the scope of the present study.

<sup>245</sup> See fn. 127 above. There can be little doubt that there was such an increase; however, it is unlikely that this was proportionate to the increase in the size of the record.

<sup>246</sup> E.g. see above fns. 151, 152.

<sup>247</sup> C.S. 5/18/1 fol. 53v: 'ane chalice of silver or gilt weand xxxv unce'.

<sup>248</sup> C.S. 5/17 fol. 57r: wrongful withholding from the king of 'ane hurde of gold & silver to ane greit quantite'; cf. *B.P.*, ii, 519.

<sup>249</sup> E.g. C.S. 6/14 fol. 98v: alleged default in giving suit and presence before the sheriff of Forfar. The libel in this case ran in the names of both the advocate and the treasurer but it was the advocate who actually pursued the matter in court.

<sup>250</sup> E.g. C.S. 5/18/1 fol. 186r.

escheat the belongings of those who died without heirs<sup>251</sup> or those who took had taken their own life.<sup>252</sup> That is why a selection has been made of six categories which encompass activities which appear easily definable and are therefore more readily comparable. In terms of caseload, things might vary from year to year. Thus the eleven actions of deforcement that occurred between November 1528 and November 1529 were followed by a year in which no such actions occurred at all.<sup>253</sup> Thirdly, the sample years selected represent periods when four different advocates were active and, to a certain extent, the statistics might represent a difference in the priorities of each of them. It should be borne in mind that Henryson and Lauder were subject to an experienced king, whereas Wishart was functioning during the king's minority and in 1530 Otterburn faced a young king growing in confidence.

Nevertheless it does seem possible to draw one or two general conclusions from the data presented in Appendix 15. Most notably, Henry Lauder appears to have been present acting for the king on a higher proportion of court days than was the case with James Henryson. But the court did not sit on a prescribed number of days (and the number of days on which it did sit each year varied widely), nor do the figures take into account days on which the advocate attended as a judge but is not recorded as litigating for the king. It is safe to conclude, however, that Lauder, with his higher

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<sup>251</sup> E.g. above fn. 192.

<sup>252</sup> E.g. C.S. 5/18/1 fol. 176r; C.S. 5/18/2 fol. 206v. The case of Robert White, 'that slew himself', was later mentioned by Balfour, *Practicks*, ii, 556.

<sup>253</sup> This might simply be a statistical anomaly, it might represent a localised degree of unrest, or it might even represent a preference by Adam Otterburn to target periodically particular types of cases in order to prepare them and have them heard in fairly short compass. It is noticeable, for example, that on occasion considerable numbers of similar cases were heard at the same time: thus on 12 May 1527 Otterburn brought two cases of contravention of lawburrows (C.S. 5/37 fol. 117v), while he brought seven actions of error on 18 March 1530 and a further five on 23 March (C.S. 5/41 fols. 18v-21v; 32r-35r).

caseload, spent more time than Henryson in dealing with the king's affairs in court. The data collected is not sufficient to indicate whether there was a general upward trend in caseload during the period under review; however, even in Lauder's case the number of cases dealt with was not particularly high. All the advocates certainly had time and energy to devote to other clients and activities.

Despite the variety of cases, it is clear that the number of actions involving the process of recognition that occur in James V's reign is very much lower than was the case a generation earlier, reflecting the success and persistence of James Henryson in pursuing such actions.<sup>254</sup> The emphasis appears to have shifted, certainly by the end of the reign, to actions based on the casualties of nonentry and ward. The aim - to raise revenue - remained the same, but circumstances had forced a change in tactics. Actions of error, usually against inquests serving *briefes of inquest*, remain a consistent feature, but there does appear to be a change in the way the lords dispose of them. In 1506 the lords made a decret in nine such cases and six times found that although the inquest had erred, they had done so ignorantly rather than wilfully. The result was that the *retour* was annulled but without escheat to the crown. In the three other cases in which decreets were given there is no indication that the parties found to have erred unjustly were to be escheated.<sup>255</sup> In 1530, however, of the seventeen decreets issued eleven included provision for the inquest to be punished by escheat and only in two cases was it decided that the error had been ignorant.<sup>256</sup> The charge in

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<sup>254</sup> Most of those cases which appear in 1506 actually involve appeals against recognitions already made, seeking to have them "lowsed" (loosed). See 'The Procedure of Recognition' at the end of the chapter.

<sup>255</sup> C.S. 5/17 fols 155r, 214v; C.S. 5/18/1 fol. 143r.

<sup>256</sup> The inquests in the other cases were *assoilzied*.

all cases, however, referred to manifest and wilful error, as opposed to unjust error which had been the norm in 1506. This indicates a change in practice. In 1541 the standard accusation was still that the inquest manifestly and wilfully erred. However not one of the eleven decreets issued by court in that year found the charge substantiated. In seven cases the error was said to be ignorant only and in the remaining cases the defenders were assoilzied.<sup>257</sup> Although seven retours were thus annulled, no-one was escheated and this suggests that the court was less willing than it had been a decade earlier to find wilful error to have been established on the facts. This might indicate that the court was sympathetic to those serving on inquests and, perhaps, that it was aware of the potential abuse of the action of error as an indirect means of raising revenue for the crown. After all, it does seem harsh to escheat the members of an inquest which had correctly retoured that the king was superior of land that had been in ward and nonentry for thirty-eight years but which had failed to distinguish which of those years the lands had been in ward and which years they had been in nonentry.<sup>258</sup>

## Matters Criminal

The distinction between criminal and civil actions certainly existed during the reign of James V and was referred to by contemporaries, but its boundaries are notoriously

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<sup>257</sup> The seven cases of ignorant error may be found at: C.S. 6/14 fols. 111r, 145v, 161r, 187r; C.S. 6/15 fols. 69v, 170r; and C.S. 6/16 fol. 85r. The four cases where the defenders were assoilzied were: C.S. 6/14 fols. 45r, 165v; C.S. 6/15 fols. 24v, 34r. One further case was mentioned but not finally concluded during this year.

<sup>258</sup> C.S. 6/14 fols. 187r, 189v. Cf. *King v Ninian Bruce*, heard at the same time, where lands were held in the king's hands for ten years, two of which by reason of ward and the other eight by reason of nonentry: C.S. 6/14 fol. 188v.

difficult to draw.<sup>259</sup> In some instances the same activity could have been considered either a civil or a criminal wrong.<sup>260</sup> Thus there are references to actions in which the advocate made it known that he intended to pursue the case only as a civil matter and thereby renounced any criminal action.<sup>261</sup> To the crown, the pursuit of criminal matters was not simply part of its obligation to administer justice or to look to the internal security of the realm; there were also financial benefits in terms of fines and escheats, as well as indirectly from the purchasing of remissions.<sup>262</sup> Just as civil litigants sometimes sought to ward off disaster by paying a composition to the crown, so those convicted of crimes might be able to purchase a pardon. Legislation from the reign of James IV recognised the problems posed by the regular use of remissions in terms of general lawlessness, but throughout the sixteenth century attempts to restrict the grant of remissions appear to have met with limited success and regularly had to be repeated.<sup>263</sup> In April 1528 James V in presence of the lords promised 'to hald his handis fra geving of any respect or remissioun to ony persounis in tyme to cum without aviss of the lordis of counsale'.<sup>264</sup> A case early in Mary's reign illustrates the potential difficulties caused to the crown by the grant of remissions. A man named Alan Wilson was convicted for common theft before the bailie of Cunningham, his goods were escheat to the crown and he was put to the horn.<sup>265</sup> The bailie depute, Adam Montgomery, intromitted with Alan's goods which now belonged to the queen

<sup>259</sup> *Fife Sheriff Ct. Bk.*, 322ff.

<sup>260</sup> E.g. breach of protection, A Harding, 'The Medieval Brieves of Protection and the Development of the Common Law' (1966) J.R. 115; also deforcement, *Fife Sheriff Ct. Bk.*, 322.

<sup>261</sup> C.S. 6/28 fol. 62r.; see fn. 81 above.

<sup>262</sup> For instance the distinguishing feature of the developed action of contravention of lawburrows, which was regularly pursued by the king's advocate, was that the caution forfeited was equally distributed between the crown and the complainer: Clark, *Lawburrows* 18. In the early fifteenth century the forfeit simply went to the crown: Clark, *Lawburrows*, 15; *Fife Sheriff Ct. Bk.*, 331.

<sup>263</sup> C.Gane, 'The Effect of a Pardon in Scots Law', (1980), J.R., 19ff.

<sup>264</sup> C.S. 5/38 fol. 94r. See also *A.P.S.*, ii, 287 c. 13 (1524).

<sup>265</sup> C.S. 6/22 fol. 78r. 22 January 1547.

(i.e. to the treasurer) and it was the responsibility of Adam and the bailie to account for this property in the exchequer.<sup>266</sup> However, as the queen's advocate was informed, the fugitive Alan had received a remission for his crimes. Thereafter he had raised a summons before the sheriff of Ayr against Adam Montgomery, the bailie depute, accusing him of the spuilzie of the goods of which he had been escheated. The advocate, claiming collusion between Alan and Adam, succeeded in advocating the case from the sheriff court of Ayr to the session because the action concerned the queen's property. He clearly suspected Alan of bribing the bailie depute in order to get back his property in defraud of the crown; however, this had only been made possible in the first place by the crown's policy in granting remissions.

The most serious criminal offence which the advocate dealt with was treason. Mention has already been made of the forfeiture of Albany and James Gifford and the other treason cases pursued by Ross of Montgrennan in the 1480s.<sup>267</sup> During the reign of James IV, the major treason trials were connected with government campaigns against the Isles and, in particular, those who supported and harboured Donald Dubh. James Henryson was closely involved in their prosecution.<sup>268</sup> In February 1506, for example, he oversaw the forfeiture of Torquil MacLeod of Lewis, the earl of Argyll's brother-in-law, for treasonably harbouring Donald and failing to hand him over to the king.<sup>269</sup> These proceedings were relatively straightforward in the sense that the personalities and issues involved were clear. This contrasts with the factional politics that

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<sup>266</sup> The bailie was Hugh, Earl of Eglinton, who was dead by the time the action reached the lords of council.

<sup>267</sup> See above fn.25.

<sup>268</sup> Macdougall, *James IV*, 177-190; Nicholson, *The Later Middle Ages*, 545.

<sup>269</sup> *A.P.S.*, ii, 264. Pitcairn, *Criminal Trials*, i, \*49.



characterised most of the minority of James V. From Angus' seizure of power, and his retention of control over the person of king in November 1525, his political opponents were faced with the very real problem that any armed resistance to Angus could be construed as a treasonable attack upon the king.<sup>270</sup> In the wake of such an attack, carried out on 23 July 1526 at Darnick near Melrose by Walter Scott of Buccleuch and his supporters, those responsible were summoned for treason.<sup>271</sup> The interesting thing about this summons was that the lords of council ordered that it 'be maid in dew forme as it pleisis our soverane lordis advocat to libell'.<sup>272</sup> That is, the king's advocate was personally to draw up the summons. Men of law did not generally draw up summonses, but it appears that it had become standard practice for the king's advocate to draft summonses for treason.<sup>273</sup> In November 1527 Angus' uncle, Archibald Douglas of Kilspindie, the treasurer, requested the lords to command 'the kingis advocat to libell a summondis of tresoun' against the earl of Moray.<sup>274</sup> That political events had come full circle, and that the advocate had a certain discretion in framing the summons, is evident from another entry in the *acta* made on 13 July 1528:

'Oure soverane lord with the aviss of the lordis of his counsale ordanis his advocat to mak summondis of tresoune apoun archibald erle of angus george douglas his brothir archibald douglas of kilspindy his eme and alex[ande]r drummond of carnok for sic punctis of tresoune as he can

<sup>270</sup> As Emond points out (*Minority*, 493) it was generally believed that Angus was not afraid to bring the king to the battlefield. This explains the reluctance of the lords assembled near Linlithgow on 17 January 1526 to launch an attack: they would have been liable to a charge of treason.

<sup>271</sup> Emond, *Minority*, 508-9 (including footnote 104).

<sup>272</sup> C.S. 5/36 fol. 87v: 20 August 1526. Lord Hay refused to consent to this unless it was done with the advice of the king or the Three Estates.

<sup>273</sup> Contrast actions of error in which the summons might not even be in the advocate's possession where another party was jointly involved with him in pursuit of the case: e.g. C.S. 5/30 fol. 208v, where Alexander Sutherland, co-pursuer with the king against a sheriff and inquest, was in custody of the summons when he failed to appear after his name was called at the Tolbooth door.

<sup>274</sup> C.S. 5/38 fol. 30r. The political background to this is briefly mentioned by Kelley, *Douglas Earls of Angus*, 383. Douglas was in possession of the castle of Spynie which Moray had taken from him. This was at a time when attempts were being made to have Douglas' illegitimate son, Alexander, raised to the vacant see of Moray following the death of Robert Shaw, the previous incumbent.

libell aganis thame to be summond to comper the ferd day of September  
nixt tocum and to speid the samin with diligence'.<sup>275</sup>

According to Kelley, the trial of Angus was the first known case in Scottish history of legal defences being offered to a charge of treason.<sup>276</sup> It is interesting, if hardly surprising, to note that the first ground of defence was that Angus and his co-defendants could not obtain the services of a man of law to defend them.<sup>277</sup> The points of treason which Otterburn was able to libel were not particularly impressive and Emond is correct to conclude that they could never have secured a death sentence.<sup>278</sup>

The substantive law of treason was described briefly, including details of some leading cases, by James McGill and John Bellenden in the *Discours Particulier* in 1560.<sup>279</sup> The major treason trials of James V's reign however are not mentioned. These are the actions brought in the years following James' return from France, most notably against the Master of Forbes, Lady Glamis, James Hamilton of Finnart, James Colville of East Wemyss and the posthumous action against Master Robert Leslie. Cameron has suggested that James, rather than lashing out indiscriminately in his paranoia over the Douglasses, was willing to wait patiently to revenge himself on

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<sup>275</sup> C.S. 5/38 fol. 131v. The king is noted as being present on this day. Two days previously, parliament had been summoned to assemble on 2 September. The ground of revocation of Angus' forfeiture in March 1543 rested on confusion in the record about the date of the summons of treason, given as 13 June in the parliamentary record. The summons was actually made on 13 July and the charges related to Angus' his activities *after* 13 June: Emond, *Minority*, 556.

<sup>276</sup> Kelley, *Douglas Earls of Angus*, 402. In 1587 treason was specifically excepted from the rule that no prosecution was competent in the absence of the accused: *A.P.S.*, iii, 457-8.

<sup>277</sup> *A.P.S.*, ii 322. In 1539 Hugh Rigg only agreed to represent James Colville in a treason case on condition that he himself 'incur na cryme nor uthir displessyr throw his procuratioun': *A.P.S.*, ii, 353.

<sup>278</sup> Emond, *Minority*, 557. The basic charge was that Angus had raised an army against the king and had sought to hold Tantallon and Newark against him: *A.P.S.*, ii, 324-6. There was certainly no question of conspiring to kill the king; the most that could be alleged was that Angus had exposed him to danger.

<sup>279</sup> P.G.B. McNeill, 'Discours Particulier d'Escosse 1559/60', in W.D.H. Sellar, (ed.), *Miscellany II*, (Stair Society; Edinburgh, 1984), 123-131.

particular targets who had actively supported Angus' minority government.<sup>280</sup> If this interpretation is correct, then the legal attack upon the dependants of the late Robert Leslie in 1540 can only be understood as motivated by the king's desire to gain financial profit from the escheat of his estate. Leslie was not a significant enough political figure to warrant prosecution; it may only have been bad luck that his name became associated with Finnart's alleged plot to kill the king in 1529. Indeed Leslie only became implicated after Finnart's execution. It is entirely consistent with the king's policy in legal matters that he should require Henry Lauder to prosecute the family of a man who had long been a legal colleague of his in order to get his hands on the escheat.

A supplication before the lords of the articles and council in February 1541 brings to life the fearful atmosphere of this period.<sup>281</sup> It had been alleged by William Geddes that John Ross had clandestinely spoken with James Geddes, knowing him to be a servant of Archibald Douglas of Kilspindie, the earl of Angus' brother. William failed to prove his allegation and was condemned to death for leasing-making.<sup>282</sup> This, however, was not enough to assuage John's fear and he wanted the secretary to demonstrate what the king's will was in the matter. The king, as sought, granted a declaration of John's innocence under the great seal. With the potential of the use of torture to obtain evidence of guilt at a later date John was probably wise to take this precaution. The following year Lord Glamis had his sentence of forfeiture reduced

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<sup>280</sup> Cameron, *Personal Reign*, 371-3.

<sup>281</sup> C.S. 6/14 fol. 201v. (21 February 1541.)

<sup>282</sup> On which see Hume, *Crimes*, i, 344ff. Hume accepts that contemporary leasing-making involved the notion of 'calumny carried to the king against a subject'.

because his conviction was based on the use of a confession extracted under torture. Such evidence was, however, generally admitted.<sup>283</sup>

The consequences of many treason convictions in the latter part of James V's reign were reversed early in the reign of his daughter when political circumstances were very different. The most notable beneficiary of this was the earl of Angus.<sup>284</sup> But, as was seen with Adam Otterburn, the holder of the office of king's advocate had to be prepared for sudden changes in political fortune and Henry Lauder does not appear to have suffered for his role as James V's prosecutor. He avoided the fate of Henry VII's agents, Empson and Dudley, although it is a moot point whether James Henryson would have done so had he survived beyond James IV's reign.<sup>285</sup>

Henryson was not greatly occupied in the prosecution of treason. However in the pursuit of more mundane cases, both criminal and civil, he and his successors were at times required to leave their Edinburgh residences and go further afield. In the years prior to his appointment as justice clerk in 1507, Henryson can be found in justiciars' courts throughout the realm. His name appears after that of Richard Lawson on a witness list in an instrument drawn up in the tolbooth of Ayr during a justice ayre in June 1505.<sup>286</sup> The following year he again appears on a witness list with Lawson witnessing a transumpt made in the tolbooth of Lauder by the justiciar, Lord Gray, during another ayre.<sup>287</sup> He received expenses for his attendance at the ayres of Perth

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<sup>283</sup> I.D. Willock, *The Jury in Scotland* (Stair Society, Edinburgh, 1966) 199-200.

<sup>284</sup> Kelley, *Douglas Earls of Angus*, 535, 541.

<sup>285</sup> On Empson and Dudley see S.B. Chrimes *Henry VII*, (London, 1972), 316-7; D.M. Brodie, 'Edmund Dudley: Minister of Henry VII', (1932), *T.R.H.S.* (4th ser.) 133.

<sup>286</sup> NRA(S), no. 852 (Hunter of Hunterston) no. 4.

<sup>287</sup> 15 May 1506: (S.R.O.)G.D. 150/269 (Morton Papers).

and Stirling in July 1507.<sup>288</sup> In October 1511, at a justice court in Ayr, he witnessed as John Muir produced a remission for alleged oppression in the poinding of bestial pastures and promised to satisfy the complaints of others against him.<sup>289</sup> It was asserted in chapter four that most men of law were well known in the major tolbooths of sixteenth century Scotland; this was nowhere more true than in the case of the crown's advocates.

## Conclusion

The substance of the role of the king's advocate developed during the reign of James IV when, under financial pressure, the crown began a sustained programme of litigation against tenants and others who had not been sufficiently scrupulous in their legal affairs.<sup>290</sup> In the criminal sphere income was drawn from the sale of remissions. By overseeing these activities, in close consultation with other officials, the early king's advocates grew in importance. The business in which these men engaged on the crown's behalf was extremely varied, ensuring that the king's interests in all spheres of legal activity were protected. When a group of men spuilzied royal letters from the king's sheriff *in hac parte* and then placed the purchaser of those letters in the king's 'irnis & stokkis', it was the advocate who brought a case against them.<sup>291</sup> When the earl of Huntly's brother was threatened and hindered from making his way to school, market and kirk it was the king's advocate who brought an action against his tormentors.<sup>292</sup> From economic matters, such as forestalling in burghs,<sup>293</sup> to 'law

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<sup>288</sup> *T.A.*, iii, 329.

<sup>289</sup> (S.R.O.) R.H.6/775b.

<sup>290</sup> See Macdougall, *James IV*, 156ff.

<sup>291</sup> C.S. 5/17 fol. 107r-108v.

<sup>292</sup> C.S. 5/36 fol. 11v.

and order' issues such as the illegal convocation of lieges,<sup>294</sup> the advocate was the person with ultimate responsibility for raising actions to enforce the king's laws.

In terms of organisation, the king's advocate did not hold his office jointly in the period prior to Mary's reign but, although he nominally functioned as an individual, he was to a large extent reliant on the help of others. Without the co-operation of the financial officials of the crown and, prior to 1507 and again after 1524, the justice-clerk, he could not have obtained the evidence which in most cases was vital to the performance of his function. Moreover on those occasions when royal or burghal business prevented his attendance in court, the advocate required the co-operation of fellow men of law upon whom he could rely to represent the king's interests in his absence. Eventually such *ad hoc* substitution was regularised to some extent with deputed appointed on a permanent or semi-permanent basis. This worked so smoothly that by 1534 Adam Otterburn could spend six months abroad without seriously disrupting the administration of the duties of his office.<sup>295</sup> Over its first century of development the office of king's advocate showed steady growth and development, although it is true to say that many features of the advocate's activity and procedure were already evident by 1513.

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<sup>293</sup> E.g. C.S. 6/13 fol. 193r.

<sup>294</sup> E.g. C.S. 5/30 fol. 29v.

<sup>295</sup> From late November 1533 to June 1534 Otterburn was in London.

## The Procedure of Recognition

Recognition was a casualty which could give rise to two types of action. The casualty arose where a vassal holding land by ward and relief alienated the major part of his lands without his superior's consent or confirmation. Sasine of the land immediately reverted to the superior without need for legal process. Skene gives two reasons for this: firstly that the vassal has by his action demonstrated contempt for his superior ending their relationship and, secondly, because in alienating the greater part of his land he has placed himself in a position where he may not be able to meet his obligations to the superior.<sup>296</sup>

Although sasine reverts to the superior, no ground of legal action has yet arisen. The vassal does not forfeit his interest in the land until a year and a day after the superior has asserted his right to take it back. The vassal has forty days in which to repledge the lands. This means that he may request that the superior return his interest in the lands promising that he shall fulfil his obligations in future and finding caution that he should do so. If the superior refuses this request unreasonably then the dispute may give rise to an action before the lords of council. This is known as 'lousing' a recognition and involves the vassal bringing an action desiring the land 'to be lettin to him to borgh', that is, given to him under caution. This is the ground of action in the case of Winchburgh involving the king and George, Lord Seton. Seton argued that the lands had been in his family beyond the memory of man and that they been alienated but not by him. Indeed he argued that any transactions by his predecessors had been

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<sup>296</sup> Skene, *D.V.S. sub nomine* 'Recognition'.



followed by charters of confirmation by the Crown and that, even if this were not the case, any right of action against him had prescribed. In support of his argument he produced the charters of confirmation from the reigns of James I and James III. This argument appealed to Balfour who gives it as authority for the rule that “the trespass of the predecessour sould not be extendit to his air or successour”.<sup>297</sup> More immediately, however, James Henryson argued that the charters were irrelevant and the lords agreed with him.<sup>298</sup> The reasoning they give is, as usual, cryptic. Seton’s reasons, they held, were “nocht sufficient anewch (enough) to consal the kingis grace til (to) lowis the said recognition nor til lat the saidis landis & barony of winchburgh til borgh til the said george lord seton”.<sup>299</sup>

Once a year and a day has passed, and the lands have not been returned to the vassal, then the superior may raise a summons against the vassal summoning him to the lords of council. In this action the superior seeks a declarator that the lands ‘pertene in propirte’ to him.<sup>300</sup> Once this decret was granted, the vassal no longer had any right to possess the land. To put this into context, the onus was on the king’s advocate to establish that the major part of lands held in chief of him were alienated without the king’s consent. If this could not be proved then the recognition would be ‘lowsit’.<sup>301</sup>

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<sup>297</sup> Balfour, *Practicks* ii 484.

<sup>298</sup> Cf. *King v Alexander*, Lord Erskine 28 November 1505, where the defender produced a charter of confirmation ‘of Robert Stewart of Scotland’ which was held to be sufficient evidence of consent to release the lands in question from recognition: C.S. 5/17 fol. 55r.

<sup>299</sup> C.S. 5/14 fol. 7v.

<sup>300</sup> Balfour, *Practicks* ii 486-7.

<sup>301</sup> For example, *King v Archibald Meldrum*: C.S. 5/17 fol. 41v.

Thus an action of recognition can mean one of two things depending on whether the pursuer is the superior or the vassal. As Professor MacQueen has noted, the *briefes* rule did not apply to such actions and that explains why the lords of council had jurisdiction to hear them.<sup>302</sup> Both types of case occurred regularly particularly during the reign of James IV.<sup>303</sup> In Balfour's discussion of recognition the majority of the cases which he cites come from the time when James Henryson was king's advocate.

The standard actions based on the recognition have been described and in graph 15.2 in Appendix 15 below the column marked 'recognition' represents the combined total of both kinds of action in which the king's advocate was involved. In addition to these actions both Balfour and Skene describe other circumstances in which the procedure of recognition might arise. Of these the most important was that the superior could recognise lands that were in nonentry until sufficient security was made by the heir for payment of relief. This should be differentiated from actions of nonentry recorded in Graph 7.2 in which the issue generally relates to whether in fact lands which the king claimed to be in nonentry actually were.

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<sup>302</sup> MacQueen, *Common Law* 115-122.

<sup>303</sup> Indeed Skene noticed that many examples "are extant in the Register in the dais of King James the Fourth, of gud memorie": *D.V.S. sub nomine* 'Recognition'.

## Chapter Eight

### Advocacy for the King (2): The King's Advocates 1493-1561

*Consultissimo viro Iacobo henrisoun serenissimi Scotorum  
regis Iacobi quarti capitalium rerum quaestori tetrastichum*

*Dum licet & caelo miti spes ulla colonis,  
Omnia continuo rura labore sonant.  
Sic mihi si faveas studij pars maxima nostri,  
Dulcis erit sudor tempore grana leges.<sup>1</sup>*

This poem, published in Paris around 1512, was written by James Foulis, a young Scot following one of the traditional paths to wisdom by studying in the universities of France. It was dedicated to James Henryson, the poet's relative, who himself had studied in Paris in the 1480s.<sup>2</sup> Henryson's death at Flodden in 1513 prevented the realisation of the sentiment expressed in the poem: he did not live to enjoy the great rewards of the poet's academic efforts. But the family connection is coincidental. Foulis was a man with ambitions to be a lawyer - he would soon be making his way from Paris to Orléans to join a number of his countrymen in the study of law - and the man to whom he dedicated his work had been for almost two decades the foremost man of law in Scotland.<sup>3</sup> The classical epithet '*quaestor*', is not without significance not least because Henryson's legal career had been without precedent. By 1510, as the

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<sup>1</sup>*Jacobo Follosii Edinburgensis Calamitose Pestis Elegia Deploratio. Euisdem addivam Margaritam reginam sapphicum carmen. Etc.* (Paris, 1512). (N.L.S.) Hall 197d.

*As long as hope may fall upon farmers under the gentle sky,  
and all estates continuously resound in work.  
if you favour me in this way the greatest part of our effort  
will be sweet perspiration; in time you will reap the harvest.*

<sup>2</sup> *Auctarium Chartularii Universitatis Parisiensis Tomus III*, 542: January, 1484.

<sup>3</sup> Kirkpatrick, 'Scottish Nation at Orléans', 81-83. On Foulis see also chapter three above.

man charged with defending the king's rights in the courts of law, his importance was immense.

Hitherto, Henryson has been accepted as Foulis' grandfather, the father of his mother Margaret, who was married to an Edinburgh skinner also called James Foulis.<sup>4</sup> In fact, Foulis was the son of another Edinburgh burgess, Henry Foulis. In one of Foulis' poems there lies the clue to his true relationship with James Henryson who, it appears, was the maternal uncle who took him into his household when plague had killed his sister, brother and, finally, his own parents.<sup>5</sup> This outbreak of plague in Edinburgh occurred in the late 1490s.<sup>6</sup> This makes sense of the chronology of Henryson's own early life. As an undergraduate at the University of Paris from 1484, and elected in December, 1485, as proctor of the German Nation there, his own birth probably occurred in the late 1460s.<sup>7</sup> This would make him rather young to have been a grandfather in the 1490s (although that possibility still cannot be altogether discounted). Indeed his first appearance as a procurator before the lords of council was not until 1490. The record of his name on the matriculation roll of St Andrews university in 1488 indicates that he may have spent some time there on his return from Paris before setting out on his legal career.<sup>8</sup>

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<sup>4</sup> *DNB*, vii, 510.

<sup>5</sup> J. Ijssweijn and D.F.S. Thomson, 'The Latin Poems of Jacobus Follisius or James Foullis of Edinburgh', *Humanistica Lovaniensia*, 24, (1975), 116, 143. Henceforth, 'Ijssweijn and Thomson, *Poems of James Foulis*'.

<sup>6</sup> Ijssweijn and Thomson, *Poems of James Foulis*, 140.

<sup>7</sup> *Auctarium Chartularii Universitatis Parisiensis Tomus III: Liber Procuratorum Nationis Alemanniae in Universitate Parisiensis*, Eds. C. Samaran, Ae. Van Moe, (Paris, 1935), 593.

<sup>8</sup> *St Andrews University Records*, 185.

The first reference to Henryson as king's advocate occurs in October, 1493.<sup>9</sup> Less than two months later he was sworn in as a burghess and guild brother of Edinburgh.<sup>10</sup> This status he gained through his father, Robert Henryson, who was an Edinburgh burghess and, according to one later commentator, 'a man of distinction in the reign of King James III'.<sup>11</sup> Robert certainly seems to have been fairly wealthy. In 1461 he acquired an interest in some land in Inverkeithing, an interest which he immediately transmitted to his eldest son John whose early death by 1486 saw the land in turn fall into the possession of James' surviving elder brother George. Eventually the land fell into the hands of George's son Robert, James' nephew.<sup>12</sup> Throughout the 1470s numerous references to Henrysons appear in James Darow's protocol book which covers mainly the burgh of Stirling but also from time to time bears mention of dealings with land and property elsewhere in Stirlingshire and also in Fife.<sup>13</sup> One such transaction, witnessed by a Robert and William Henryson, occurred in 1476 and involved Elizabeth Airth of Plean and various lands of hers including those at Fordell in Fife which James Henryson, at the height of his power, was later to purchase.

More immediately, it is not until April 1494 that there is evidence for Henryson's marriage, to Helen Baty, daughter of the Edinburgh burghess John Baty, which may have occurred several years prior to this date.<sup>14</sup> Henryson was acting as executor of his late father-in-law's estate in July 1494.<sup>15</sup> At the end of the year he acted as

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<sup>9</sup> *A.D.C.*, i, 307:21 October, 1493.

<sup>10</sup> *Edin. Burgess Roll*, 244: 7 December, 1493.

<sup>11</sup> Sir Robert Douglas, *Baronage*, 518.

<sup>12</sup> James himself had links to Inverkeithing: (S.R.O.) GD 172/108 and GD 172/123.

<sup>13</sup> (S.R.O.) B66/1/1/1. The (S.R.O.) transcript has been used and compared, when required, with the original text.

<sup>14</sup> *Prot. Bk. Young*, no. 688: 1 April, 1494.

<sup>15</sup> (S.R.O.) GD 172/171: 21 July, 1494.

forespeaker for Henry Foulis before the lords auditors of Parliament and it is likely that by this date Foulis was his brother-in-law.<sup>16</sup> Henryson's own immediate family tends to confirm the view that Henry Foulis was his contemporary rather than his son-in-law. Of his eldest son nothing is definitely known except that, according to a hitherto unnoticed reference to him in October 1508, his name may very well have been Patrick.<sup>17</sup> Douglas, and everyone since, has asserted that the eldest son died with his father at Flodden.<sup>18</sup> Having fought at that battle Patrick must have been born before 1495. The next son, George, was old enough to be at university in 1510 whilst the youngest, James, was definitely alive in 1508 and certainly dead by June, 1530.<sup>19</sup> Indeed George was also the subject of a dedication by James Foulis. The verses which Foulis devoted to his young cousin were published twice and have one variant reading: *puero* in the first version, is replaced by *iuvenis*, indicating that between 1509 and 1512 George had changed from a boy into a young man.<sup>20</sup>

The most significant aspect of James Henryson's career is not merely the fact that he was the first to hold the office of king's advocate; it is the fact that he held that office within the context of a career spent representing a large number of other clients. The

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<sup>16</sup> *A.D.A.*, 204: 15 December, 1494. Henry and his wife had three children by the time they died in the plague outbreak dated to around 1499: Ijswijn and Thomson, *Poems of James Foulis*, 140.

<sup>17</sup> *Prot. Bk. Foular*, ii, no. 503, also no. 497; these make reference to Patrick as James's son but other evidence indicates that he must be the eldest son; see also Laing, *The Poems and Fables of Robert Henryson, now first collected*, (Edinburgh, 1865), xlvi, [henceforth Laing, *Poems of Robert Henryson*] who mentions Patrick but who does not make the connection with James. Henceforth I will assume that the name Patrick is correctly ascribed to Henryson's eldest son.

<sup>18</sup> Douglas, *Baronage*, 518; I have not seen any direct evidence for this but certainly after 1513 no record of a Patrick Henryson identifiable with the advocate's family appears to survive and George is designed 'heir' of his father.

<sup>19</sup> *Prot. Bk. Foular*, ii, no. 503: 20 October, 1508; William Stephen, *A History of Inverkeithing and Rosyth*, (Aberdeen, 1921), xlvi.

<sup>20</sup> Ijswijn and Thomson, *Poems of James Foulis*, 132, 150. This is a further indication that James Henryson was Foulis' uncle, rather than his grandfather.

king was a great deal more than *primus inter pares* amongst Henryson's clients, and acting for the sovereign accounts for much of his activity, but it did not preclude him from acting on behalf of others not all of whom by any means were connected to the royal administration. In part, this was due to the fact that the office of king's advocate was still embryonic. The king had legal interests to defend but for the first time his legal interests had begun to be properly exploited before his council. Driven by political circumstances, coloured by an unwillingness to summon parliament in order to raise revenue by the unreliable means of direct taxation, a policy was adopted of taking stricter notice of the king's legal rights to augment the crown's finances. The most notorious means of achieving this goal was the use of the procedure of recognition which, although used during the reign of James III, was exploited in a much more rigorous and sustained way during his son's reign with correspondingly greater reward.<sup>21</sup> Henryson is the man most closely associated with this policy and may well have been its architect, working in close co-operation with the treasury. But the very fact that he succeeded Richard Lawson as justice clerk general in 1507 indicates that not all of Henryson's time was taken up with his work as king's advocate.<sup>22</sup> It is noticeable, however, that significantly fewer private clients constituted him as their procurator after 1507 than had done so hitherto, and this must reflect his busier public duties which, of course, included acting occasionally as a lord of council.

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<sup>21</sup> Macfarlane, *Elphinstone*, 163-4; Ranald Nicholson, 'Feudal Developments in Late Medieval Scotland', *J.R.*, (1974) 16; Craig Madden, 'Royal Treatment of feudal casualties in late medieval Scotland', (1976) *S.H.R.*, 172, *passim*.

<sup>22</sup> Lawson was dead by August, 1507: *Prot. Bk. Foular*, ii, no. 340: 25 August, 1507.



Henryson, as well as representing private clients, discharged the office of town clerk of Edinburgh. He is first recorded holding this position in 1502. According to Inglis<sup>23</sup> this post was permanent but the evidence only points to Henryson holding it in two years, 1502 and 1507.<sup>24</sup> Nonetheless there appears to have been no new clerk named between Henryson in 1502 and Adam Otterburn in 1512; he possibly therefore held the post for up to a decade.<sup>25</sup> It was an unsalaried position but the common (or town) clerk drew fees for acting as notary in regard to ceremonies of sasine involving property within the burgh and indeed he may have held a monopoly of such business.

In terms of private clients, Henryson's business prospered although his allegiance to his principal employer, the king, naturally brought with it from time to time conflicts of interest. For instance, in 1501 Henryson acted for John, Earl of Atholl.<sup>26</sup> Almost five years to the day later, he acted for the king against Atholl in relation to the lands of Bochrum and Kinninmonth in the sheriffdom of Banff which, Henryson claimed, belonged to the king by reason of the forfeiture of John Douglas of Balvenie in 1455.<sup>27</sup> But so far as it is possible to tell, Henryson was free to represent clients before the lords of council, or before ordinary judges, without his activities for the king imposing major restrictions upon him. Indeed, his position with the king could function as a means of creating business. The only surviving letter from James IV to Henryson, written just two months before Flodden, instructed him to 'stand with' William Leslie, brother and heir of the late earl of Rothes, in his pursuit of justice

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<sup>23</sup> Inglis, *Adam Otterburn*, 5; see also Elizabeth Ewan, *Townlife in Fourteenth Century Scotland*, (Edinburgh, 1990), 50.

<sup>24</sup> *R.M.S.*, ii, no. 2685; *Prot. Bk. Foular*, ii, no. 340: 25 August, 1507.

<sup>25</sup> *Edinburgh Burgh Recs*, i, 272, 276.

<sup>26</sup> *A.D.C.*, ii, 475: 28 February, 1501.

<sup>27</sup> C.S. 5/18/1: fol. 53r: 7 February, 1506; on this forfeiture see McGladdery, *James II*, 94-5.

before the lords of council particularly in connection with the barony of Ballinbreich.<sup>28</sup> Henryson was to 'procure for the said Williame, sa fer as the actione concernis him self, and help him the best ye may thairin'. As to local courts, even before becoming king's advocate, Henryson had acted as *prelocutor* for the widow Marion Farnely before the sheriff depute of Edinburgh in a case concerning her terce.<sup>29</sup> Despite his promotion, he continued as a regular attender of sheriff courts, appearing for example before John Hepburn, sheriff depute of Haddington, in the Tolbooth of that burgh in 1497.<sup>30</sup>

In addition to his yearly pension from the king for acting as his advocate Henryson was also given various additional gifts of land and revenue from the king in reward for his service. Much of this came from estates which had reverted to the king as *ultimus haeres* where landholders had died without legitimate heirs, as happened in the cases of Laurence Brown and John Henryson.<sup>31</sup> This latter individual, who died before December 1505, was himself illegitimate and was probably a relative of James, perhaps an illegitimate uncle. He can perhaps be identified with John Henryson who was sergeant of the barony of Fordell in Fife, not far from Robert Henryson's Inverkeithing interests, and it may have been gaining the gift of John's estate that encouraged James later to purchase the lands of that barony.<sup>32</sup> Henryson, particularly once he had become justice-clerk, also received incidental payments of an occasional

<sup>28</sup> *HMC*, 4th Report, (Countess of Rothes), 503, no. 98: 7 July, 1513.

<sup>29</sup> *Prot. Bk. Young*, no. 553: 5 November, 1492.

<sup>30</sup> *Prot. Bk. Young*, nos. 899, 900: 2 May, 1497; cf. also, sheriff court of Edinburgh: (S.R.O.) G.D. 40/4/99: 28 April, 1500; regality court of Broughton: *Prot. Bk. Young*, no. 1118, 20 January, 1501; sheriff court of Dumfries held in Edinburgh: *Yester Writs*, no. 278: 7 May, 1504.

<sup>31</sup> *R.S.S.*, i, no. 305: 19 December, 1498; *R.M.S.*, ii, no. 2451: 11 September, 1498; *R.S.S.*, I, no. 1179: 16 December, 1505.

<sup>32</sup> For John Henryson, see *R.M.S.*, ii, no. 1818: 22 January, 1489.

nature from the king's treasury. Thus in March 1508, for his services on the justice ayre in Dundee he received £14 10s.<sup>33</sup> For comparison, the justiciar received 40s. per day while Henryson's daily rate was 18s. Given that the ayre lasted fifteen days Henryson in fact appears to have been overpaid by one pound, but there may be a reason why his expenses were slightly higher. The same rates were in force during an ayre in the south-west from October to early December 1511, earning Henryson £53 4s and again at Aberdeen the following spring bringing in £14 8s.<sup>34</sup> That same year (1512) brought in a further twelve pounds for participation in the Chamberlain ayres of Dundee, Perth and Cupar.<sup>35</sup> It is perhaps an insight into Henryson's relationship with the king that he should have picked up the equivalent of a day's expenses on the justice ayre in April 1501 by defeating the king 'at the butts'; although this appears to be his only recorded income through gambling.<sup>36</sup>

To complement this, Henryson also had a considerable income from private clients. He received a regular pension from the bishop of Dunkeld which, at least latterly, amounted to ten pounds annually.<sup>37</sup> From 1509 the abbey of Arbroath was also paying Henryson a pension of twenty merks, together with his expenses should he be required to leave Edinburgh on abbey business.<sup>38</sup> It was also in this year that he received a tack of certain lands in Peebles from Robert, Abbot of Melrose.<sup>39</sup> Exactly how this was acquired is unknown although it was probably paid for rather than donated in return

<sup>33</sup> *T.A.*, iv, 71. As was indicated in the previous chapter, Henryson, before becoming justice-clerk, also received money for his attendance at justice ayres. For example, in 1506: *T.A.*, iii, 329.

<sup>34</sup> *T.A.*, iv, 319-20; see also (S.R.O.) RH6/775b.

<sup>35</sup> *T.A.*, iv, 320.

<sup>36</sup> *T.A.*, ii, 102. This would seem to indicate a wager with the king.

<sup>37</sup> *Dunkeld Rentale*, 248, 252, 258.

<sup>38</sup> *Arbroath Liber*, ii, 388.

<sup>39</sup> (S.R.O.) GD 172/177: dateable only to 1509.

for service. As these clients, and others such as the abbot of Paisley and the archdeacon of Caithness, indicate, Henryson did not restrict himself to the secular courts.<sup>40</sup> Fairly early in his career, he appeared, in distinguished company, in St Giles before William Wawane, the official of Lothian, as a procurator for Arbroath Abbey.<sup>41</sup>

Before he became a burghess of Edinburgh, let alone town clerk, Henryson had acted as its procurator in legal disputes.<sup>42</sup> Even a cursory acquaintance with his clientele indicates that Edinburgh was not the only burgh for which he acted nor its inhabitants the only burghesses.<sup>43</sup> He also acted for several magnates, such as the earls of Angus, Caithness and Atholl and important lords of parliament as well as for much less illustrious clients.<sup>44</sup> The reference to him acting as advocate for the poor has already been discussed in a previous chapter. But, in an age and a reign noted for acts of personal piety, Henryson was not above acting for lepers as well as the poor.<sup>45</sup> The sheer scale and diversity of his private clients indicate clearly that Henryson was first and foremost a professional man of law, even though his services were primarily at the disposal of the king.

The income from his legal activity had two primary outlets: it might be loaned out at interest, primarily to lairds and burghesses seeking capital, or it could be used to

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<sup>40</sup> *A.D.C.*, i, 318: 26 October, 1493 (George, Abbot of Paisley); Mr. James Forestar, archdeacon of Caithness: *A.D.C.*, ii, 83: 4 November, 1497

<sup>41</sup> *Arbroath Liber*, ii, 298-9: 12 December, 1496.

<sup>42</sup> *A.D.C.*, i, 316: 25 October, 1493; *A.D.C.*, ii, 38: 30 August, 1496; *A.D.C.*, iii, 1: 23 March, 1500.

<sup>43</sup> E.g., burghesses of Kintore: *A.D.C.*, ii, 136: 3 March, 1498; burgh of Dysart: C.S. 5/18/1 fol. 81r: 14 February, 1506.

<sup>44</sup> E.g., *A.D.A.*, 170: 1 June, 1493 (Archibald, Earl of Angus); *A.D.C.*, ii, 111: 10 February, 1498 (William, Earl of Caithness); *A.D.C.*, ii, 475: 28 February, 1500 (John, Earl of Atholl); George, Lord Seton, *A.D.C.*, ii, 339: 30 April, 1499 (George, Lord Seton); *A.D.C.*, ii, 423: 7 November, 1500 (John, Lord Somerville).

<sup>45</sup> *A.D.C.*, ii, 349: 17 January, 1500; *A.D.C.*, ii, 427: 9 November, 1500.

purchase land. In June 1493, along with Richard Lawson, he was acting against Alexander, lord Monypenny, to recover the penal sum of 100 merks - which appears to have been twice the original debt - by having the Lords Auditors order Patrick Monypenny not to hand over rents and other sums in his possession which he owed to Alexander until the creditors' claim was satisfied.<sup>46</sup> The following April Henryson received notice from Archibald Forrester of Corstorphine that he was in a position to redeem his lands in Longniddry, which Henryson held in security, and that he required Henryson and his wife to resign the lands according to an earlier letter of reversion.<sup>47</sup> Thus it would seem that comparatively early in his career Henryson had begun what Ives identified as a favourite sideline of London lawyers: money lending.

But it is the acquisition of land that appears to have been Henryson's particular priority. This again invites parallel with leading English lawyers of his generation whose aspiration it was to acquire land and the status of gentility.<sup>48</sup> As a contemporary English adage put it, 'service was not heritage'.<sup>49</sup> In chapter five, it was seen that both Robert Leslie and Robert Galbraith purchased land with some of their income. Later advocates purchased considerable estates but Henryson and his erstwhile colleague Richard Lawson were perhaps the first to establish sufficient landed wealth to sustain the development and influence of their families over several generations. In September 1498 Henryson was granted a tenement and one built 'domus' by the king at the southern end of the High Street.<sup>50</sup> This might have been the

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<sup>46</sup> *A.D.A.*, 179:

<sup>47</sup> *Prot. Bk. Young*. no. 688: 1 April, 1494.

<sup>48</sup> Ives, *Common Lawyers*, 330.

<sup>49</sup> Michael Bennet, 'Careerism in Late Medieval England', (edd.), J. Rosenthal and C. Richmond, *People, Politics and Community in the Later Middle Ages*, (Gloucester, 1987), 34.

<sup>50</sup> *R.M.S.*, ii, no. 2451: 11 September, 1498.

place where business, involving John, lord Carlyle, was transacted in November 1500.<sup>51</sup> There is no evidence that Henryson was even present on this occasion although the action certainly took place 'on the stair of his hospice'.<sup>52</sup> In February 1505 further business was done, this time in Henryson's 'fore-room' in Edinburgh, involving the Sinclairs of Roslin and one of their vassals.<sup>53</sup>

Henryson had already received the ward of the lands of Balbeithy in Fife, which had until his death belonged to the Laird of Drumry, and ten pounds worth of land at Clifton in Roxburghshire given to him by the king out of singular favour and as a reward for good service.<sup>54</sup> This was land that had been recognosced into the king's hands following the alienation of the greater part of it by John Elemour of Clifton. Within a year the king, as a further token of affection, had promised to infeft Henryson in the lands of Kilquhinzie and Kilkerran in Carrick, again lands which had been recognosced into his hands.<sup>55</sup> At the beginning of 1507 this grant appears to have already been made.<sup>56</sup> In 1509 Henryson acquired the lands and barony of Straiton, again after the king had obtained them through the procedure of recognition.<sup>57</sup> At the same time he took on the designation Henryson 'of Stratonhall'.<sup>58</sup> He also appears to have received the annualrent of land lying on the north side of Edinburgh's High

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<sup>51</sup> *Prot. Bk. Young*, no. 1058: 20 November, 1500.

<sup>52</sup> The word '*hospicium*' suggests that he held a lodging in Edinburgh in addition to the *domus* he received from the king and the tenement which he received from Cant in 1495 and possession of which was disputed with Fery. The same word was used of inns hired by masters for the giving of private instruction in the years prior to the founding of St Andrews university; see John Durkan, *The Scottish Universities in the Middle Ages, 1412-1560*, (Edinburgh University, unpublished Ph.D. Thesis, 1959), 8.

<sup>53</sup> *Prot. Bk. Young*, no. 1502: 25 February, 1505.

<sup>54</sup> *R.M.S.*, ii, no. 2982: 28 July, 1506.

<sup>55</sup> *R.S.S.*, i, no. 1161: 21 November, 1506.

<sup>56</sup> *R.S.S.*, i, no. 1417: 25 January, 1507.

<sup>57</sup> *R.M.S.*, ii, no. 3309; (S.R.O.) GD 172/64: 21 February, 1509.

<sup>58</sup> E.g. *Prot. Bk. Foular*, ii, no. 663: 9 August, 1510. See also note 184 below.

Street lately held by John Douglas and assigned to him by lord Maxwell,<sup>59</sup> as well as, the following year, the non-entry and ward of lands within the stewartry of Kirkcudbright.<sup>60</sup>

In addition to the lands which he received from the king and from other sources Henryson set about, in a short period in March and April 1511, buying up lands in and near Fordell in Fife. This was his only systematic purchase of an estate, which had obviously at some stage been divided between heirs portioners because the bulk of the land was purchased from various sellers in sevenths.<sup>61</sup> In May of that year the king literally gave his seal of approval to the enterprise by erecting the lands into the free barony of Fordell in Henryson's favour.<sup>62</sup> After this date, indeed to within three months of his death, Henryson continued to purchase, or at least to obtain tacks of, those parts of the barony which he did not yet possess.<sup>63</sup>

As the king's premier man of law, Henryson fulfilled a variety of tasks. As well as holding the post of justice-clerk general (and justice-clerk of the regality of Glasgow), he also acted as a lord of council.<sup>64</sup> It was in the latter capacity, for example, that he was sent by his fellow lords, together with the man of law and notary Master John Murray, to a woman named Janet Edmonstone, in order to record her deposition.<sup>65</sup>

The king also used him as a privy councillor and an ambassador. In the tense months

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<sup>59</sup> *Prot. Bk. Foular*, ii, no. 562: 25 May, 1509; but this was disputed by Sir David Stevenson, chaplain of the collegiate church of Dalkeith; *ibid.*, no. 564: 31 May, 1509.

<sup>60</sup> *R.S.S.*, i, no. 2074: 26 May, 1510.

<sup>61</sup> See Laing, *Poems of Robert Henryson*, xlv, where he also provides further evidence that Henryson did not obtain the 'fee simple' of the lands in his lifetime.

<sup>62</sup> (S.R.O.) GD 172/17/1: 1 May, 1511.

<sup>63</sup> (S.R.O.) GD 172/18/1: 10 January, 1512, sasine; GD 172/20: 10 June, 1513, tack.

<sup>64</sup> As justice-clerk of the regality of Glasgow: *Glasgow Registrum*, 520: 6 August, 1509.

<sup>65</sup> C.S. 5/19 fol. 127v: 30 January, 1508.



preceding Flodden, Henryson was peripherally involved in the diplomatic manoeuvring between James IV and his brother-in-law Henry VIII; safe conducts were issued for him to go to England on several occasions but remained unused.<sup>66</sup> In one of his letters Henry's ambassador Nicholas West records a brief meeting with Henryson which illustrates how close he was to the king.<sup>67</sup> This was never in doubt. From the odd reference in the books of council, indicating that Henryson and other leading lords entered into the council chamber in the king's train, to that one item of personal correspondence which survives between James IV and his advocate, the evidence suggests a close working relationship.<sup>68</sup>

In many ways Henryson's career as king's advocate was paradigmatic. Although the first man to hold the office of king's advocate, his career has many similarities with those of his successors. Evidence of the rewards which acting for the king produced may easily be found in the careers of Wishart, Otterburn and Lauder. The same desire to purchase land outwith Edinburgh certainly animated the burgesses Otterburn, who acquired the estate of Redhall in Midlothian and Lauder, who became Laird of St Germans in the constabulary of Haddington.<sup>69</sup> Regular and active involvement in arbitration, and also occasional missions of diplomacy, punctuate all of their careers to a greater or lesser extent.

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<sup>66</sup> *Calendar of Letters and Papers Foreign and Domestic, Henry VIII*, I, 278 (n.d.), 447 (24 July, 1511), 731 (24 January, 1513).

<sup>67</sup> *Calendar of Letters and Papers Foreign and Domestic, Henry VIII*, I, 792.

<sup>68</sup> E.g., C.S. 5/25 fol. 37r: 27 April, 1513.

<sup>69</sup> Otterburn purchased Redhall from William, master of Glencairn, in 1527: Inglis, *Otterburn*, 32-3.

It is James Wishart, Henryson's immediate successor, who does not quite fall into the pattern which Henryson's tenure of the office established. This is not surprising. Wishart is unique in never having had to take his instructions from an adult king. James V was eighteen months old when Wishart was sworn in to office and was still in his minority when the advocate died. This may explain why Wishart is the king's advocate about whom the least is known, although some details of his background have managed to survive. The son of John Wishart of Pittarrow, in the sheriffdom of Kincardine, James was probably named after his grandfather.<sup>70</sup> His mother may have been Janet Lindsay, who was John's wife in 1510.<sup>71</sup> He certainly had two brothers, probably both younger than him, John and William, and the suggestion has already been noted that the reformer, George Wishart, may also have been his brother.<sup>72</sup> James matriculated at St Andrews in 1496 as a member of the Angus nation there and became a licentiate in 1499.<sup>73</sup> It is not inconceivable that he then spent time studying abroad although he maintained his links with St Andrews, witnessing the confirmation of a charter there by Hugh Spens, provost of St Salvator's, in 1511 and marrying Elizabeth Learmonth who probably belonged to a prominent St Andrews family.<sup>74</sup> She may have been the daughter of David Learmonth who was at one time provost of the town since, in 1519, Wishart and his brother John witnessed lawburrows granted by Andrew Learmonth of St Andrews on behalf of the provost's son, David, in the sheriff court of Fife.<sup>75</sup> Interestingly, this was Wishart's only recorded appearance

<sup>70</sup> James senior was a charter witness in 1481: *R.M.S.*, ii, no. 1478: 28 May, 1481; John is described as James' father in a charter dated 1512: *R.M.S.*, ii, no. 3729: 30 April, 1512.

<sup>71</sup> *Arbroath Liber*, ii, no. 504: 28 October, 1510.

<sup>72</sup> John appears with James junior in a contract dated 1509: *Arbroath Liber*, ii, 379; William appears in a grant of 1525: *Arbroath Liber*, ii, 451; for George Wishart, see Laing, *History*, vi, 669.

<sup>73</sup> *Recs. of St Andrews University*, 195; 87-8.

<sup>74</sup> (S.A.U.L.) Cartulary 'A' b fol. 1v: 3 October, 1511.

<sup>75</sup> *Fife Sheriff Ct. Bk.*, 138: 24 March, 1519.

before the sheriff court despite his obvious connections to the region. Although he does not appear to have been constituted to appear before the lords of council until 1511, the early pattern of his constitutions indicates a slight bias towards Fife and the north-east.<sup>76</sup> Indeed the first party to name him as one of their procurators was John Melville of Carnbee, one of whose charters Wishart had witnessed at St Andrews two years previously.<sup>77</sup>

Rather than working as a professional advocate independently of the king, Wishart initially appears to have worked in the royal administration, probably as a clerk. In August 1511 he received a grant from the king of lands in the sheriffdom of Kincardine which had reverted to the crown because of nonentry.<sup>78</sup> In the charter he was described as '*regis clericus*'. The following year, he received another grant from the king, '*pro bono servitio et pro certa compositione thesaurario persoluta*', of the lands of Pittarrow (again in the sheriffdom of Kincardine) in free barony, specifying, as the *reddendo*, a pair of golden spurs.<sup>79</sup> He was appointed by James IV's widow, Margaret Tudor, during her regency following Flodden, presumably with the advice of the lords of her council.<sup>80</sup> His selection can only be explained on the basis of his pre-existing connection to the queen and the household of the late king. There were certainly more active and more experienced men of law to choose from, although it should be remembered that James Henryson had been a relative novice in 1493 when he was made king's advocate. Moreover Wishart was appointed hurriedly, in

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<sup>76</sup> C.S: 5/22 fol. 155r: 9 April, 1511 (constitution by John Melville of Carnbee, in the sheriffdom of Fife).

<sup>77</sup> R.M.S., ii, no. 3355: 21 June, 1509.

<sup>78</sup> R.M.S., no. 3619: 11 August, 1511.

<sup>79</sup> R.M.S., ii, no. 3729: 30 April, 1512.

<sup>80</sup> A.D.C.P., 4: 24 October, 1513.

unexpected circumstances, and as a direct replacement; unlike Henryson, he held both the offices of king's advocate and justice clerk from the beginning, a combination of roles never to be repeated.

Yet prior to Flodden, Wishart does not seem to have practised extensively as a man of law. He did act, albeit occasionally, on behalf of others in legal and financial matters during that period. For example, in May 1512, he delivered a sum of money to the treasurer, Andrew, bishop of Caithness, on behalf of James Arbuthnot of that ilk, a neighbour of his in Kincardine.<sup>81</sup> Even so, his sudden promotion in 1513 must, to a certain extent, have thrown him in at the deep end. His private client base appears to have remained comparatively insignificant and, outwith royal service, he had no major clients or patrons. In total, throughout his career he was only constituted as a procurator on thirteen occasions. This does not indicate a level of activity that could sustain the career of a professional man of law active before the lords of council.

Once king's advocate, it might have become dangerous for Wishart, as the king's legal representative during a troubled period, to become identified with one faction rather than another, and this may have limited his scope for increasing the number of his private clients, if that was ever his objective. Indeed his greatest asset, and perhaps the reason behind his appointment, was his neutrality and lack of damaging associations. Therefore, when in Albany's name he ordered John, lord Hay of Yester, to enter Edinburgh castle in ward, it may be assumed that as justice clerk he was merely fulfilling his administrative function, exhibiting the same political detachment

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<sup>81</sup> 'Arbuthnot Papers', (Spalding Club, Miscellany II), 106: 17 May, 1512.

as he did when signing acts of adjournal at the justice ayre of Dundee a fortnight later.<sup>82</sup> It is true that Albany rewarded his service in November 1516, with a grant of lands in Berwickshire which were part of the escheat of Alexander, lord Home.<sup>83</sup> But on his own Wishart does not appear to have been especially politically active. The little that the record reveals about him indicates a civil servant rather than an outstanding man of law, and a figure whose survival in government probably depended upon his moderation, and willingness to accommodate the several masters whom, in the course of the minority, circumstance obliged him to serve.

The real inheritor of Henryson's mantle was Wishart's successor, Adam Otterburn. Having been the subject of a monograph in his own right, Otterburn is one of the better known figures of his generation.<sup>84</sup> Unlike Wishart, Otterburn clearly had a close association with Henryson dating from as early as 1503, and it is likely that for him Henryson was something of a role model.<sup>85</sup> Both men were notaries, and both had been educated abroad although it would appear that Otterburn, unlike Henryson, did not attend the university of Paris.<sup>86</sup> In 1508 Henryson and his wife appointed him, with others, to act as procurator when transferring land in the High Street to their son James.<sup>87</sup> During the following year Otterburn acted as king's advocate in Henryson's temporary absence and in 1512 he succeeded him as town clerk of Edinburgh.<sup>88</sup> Four years later Henryson's widow, Helen Baty, sold some land in Edinburgh to

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<sup>82</sup> C.S. 5/29 fol. 59v: 4 March, 1516; C.S. 5/29 fol. 105v: 17 March, 1516.

<sup>83</sup> R.M.S., iii, no. 110: 13 November, 1516.

<sup>84</sup> J. Inglis, *Sir Adam Otterburn*, (Glasgow, 1935).

<sup>85</sup> The documented relationship between Otterburn and Henryson goes back to at least 1503: *Yester Writs*, no. 266; also, *Prot. Bk. Young*, no. 1429: 17 April, 1504.

<sup>86</sup> Inglis, *Otterburn*, 4.

<sup>87</sup> *Prot. Bk. Foular*, ii, no. 497.

<sup>88</sup> C.S. 5/21 fol. 49r.

Otterburn.<sup>89</sup> The relationship between Otterburn and Henryson's immediate family appears to have been maintained until at least 1529 when Helen's son James acted as Otterburn's procurator when land was resigned to him by Lord Somerville.<sup>90</sup> Soon after Otterburn is found acting as Helen's cautioner in respect of a sum which Helen had received under the testament of her sister, Margaret, and which she was to pay to her daughter Janet.<sup>91</sup> George Henryson of Fordell can also be found, not long after, witnessing a transaction involving Otterburn.<sup>92</sup>

Otterburn's own family associations are less certain. He may well have been descended from the family which produced notable legal figures in the fifteenth century such as Master Nicholas Otterburn, the clerk register and Master John Otterburn, official of Lothian.<sup>93</sup> Unfortunately his parents have not been traced although it is possible that Marion Brown, the widow of Thomas Otterburn, in whose favour he resigned lands in 1515, was his mother thus making Thomas his father.<sup>94</sup> It is possible that Janet Otterburn, who was married to John Laing in 1528, was his sister although he had a daughter of the same name.<sup>95</sup> Otterburn himself had two wives, Janet Rhynd and Eufame Mowbray, although it was only by the latter that he had issue.

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<sup>89</sup> (S.R.O.) G.D. 1/58/2: 8 November, 1516.

<sup>90</sup> *Prot. Bk. Foular*, iii, no. 75: 7 December, 1528.

<sup>91</sup> *Prot. Bk. Foular*, iii, no. 86: 28 January, 1529.

<sup>92</sup> *Prot. Bk. Foular*, iii, no. 159: 4 October, 1529.

<sup>93</sup> (S.R.O.) G.D. 1/661/16: 1554; *R.M.S.*, iii, no. 111.

<sup>94</sup> (S.R.O.) B22/1/9 fol. 25: 3 February, 1515.

<sup>95</sup> B22/22/18 fol. 73v (*Prot. Bk. Alexander Makneil*): 8 February, 1528. John Laing may have been related to Sir Neil Laing, the advocate and keeper of the signet during Mary's reign. Neil's first wife was Isobel Rhynd who probably belonged to the same family as Otterburn's first wife: *R.S.S.* iv, no. 1219.

His pedigree as a man of law during the reign of James IV was certainly impressive when measured by the number of times he was constituted as a procurator before the lords of council. By this indicator, he appears to have increased his level of activity just at the time Henryson's decreased after he became justice clerk.<sup>96</sup> This may have been more than coincidence and, whether or not he was apprenticed to Henryson, Otterburn's career was certainly boosted by his association with him. His professional activity certainly encompassed both the burgh court of Edinburgh and various sheriff courts. For example, he was present in 1518 when a court was held in Edinburgh by the sheriff-depute of Berwick.<sup>97</sup> As mentioned in a previous chapter, Otterburn himself was constituted one of the sheriffs-depute of Stirling by Lord Erskine in 1524 shortly before he was appointed king's advocate.<sup>98</sup> By this time he was also a lord of council and, in this respect, it is interesting to note that in 1523 he was authorised, in the absence of the justice clerk, to subscribe all deliverances in criminal cases (provided he did so along with one of the regents).<sup>99</sup>

It is in the width of his diplomatic experience that Otterburn differs most markedly from Henryson, whose own efforts in this field were ended prematurely at Flodden. By the time of the king's escape from Angus in 1528, Otterburn had had significant diplomatic contact with England, and may have been in receipt of an English pension.<sup>100</sup> On 11 July, 1528, the king took advantage of Otterburn's experience by employing him as one of those charged to 'diviss (devise) ane letter of staite to the

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<sup>96</sup> See appendix 7.

<sup>97</sup> (S.R.O.) B22/23/1 (Edinburgh Burgh Court Book, fragment): 1500x1513; *Prot. Bk. Strathauchin*, no. 295: 29 June, 1518.

<sup>98</sup> C.S. 5/34 fol. 163v: 11 May, 1524.

<sup>99</sup> C.S. 5/33 fol. 199v: 15 May, 1523.

<sup>100</sup> Inglis, *Otterburn*, 19-24.



king of Ingland with instructionis and articlis as thai sall think expedient'.<sup>101</sup> Otterburn's connection to Angus (as recently as April he had acted as attorney to Archibald Douglas of Kilspindie, the king's erstwhile treasurer and Angus' uncle), did not disqualify him from James' service.<sup>102</sup> In this respect Otterburn was not alone. The best known associate of Angus to be tolerated, and indeed promoted, by James V was Sir James Hamilton of Finnart. Both men lost the king's favour suddenly, Otterburn in 1538 and Hamilton in 1540, although unlike Hamilton the consequences for Otterburn were not fatal. Otterburn was dismissed from office for communicating with the exiled earl of Angus. In the words of the English ambassador Sir Ralph Sadler, he was 'suspected to be over good an Englishe man'.<sup>103</sup> Yet his connections with members of Henry VIII's government are probably what saved him from Hamilton's fate, since they rendered him indispensable to James' foreign policy towards the end of his reign. Even though Otterburn was sent as an ambassador to London in 1542, by then his role as king's advocate was beyond resurrection.<sup>104</sup>

Otterburn was not only provost of Edinburgh but also the burgh's legal representative and appeared on its behalf in several cases, most notably in the major action against Leith in 1522-3.<sup>105</sup> Like Henryson he had the advantage of growing up in the place that was at the centre of the political, economic and legal activity of the realm. Otterburn's successor, Henry Lauder, also came from this background. His father, Gilbert Lauder, was a man of substance; a leading burgess who in his time had acted

<sup>101</sup> C.S. 5/38 fol. 131r: 11 July, 1528.

<sup>102</sup> *Prot. Bk. Foular*, iii, no. 3: 22 April, 1528.

<sup>103</sup> *Hamilton Papers*, ii, 106; Inglis, *Otterburn*, 68-9.

<sup>104</sup> Inglis, *Otterburn*, 70.

<sup>105</sup> See chapter four.

both as bailie of the burgh and dean of guild. His mother, Gilbert's first wife Margaret McCalzeane, also belonged to an Edinburgh family and through her Henry was related to the advocate Thomas McCalzeane.<sup>106</sup> Gilbert's second wife, Elizabeth Hopper, also came from the burgh and was probably related to Janet Hopper, the wife of the advocate Hugh Rigg.<sup>107</sup> His third wife, Isobel Mauchane, also belonged to a family of burgesses, one that would later produce Master Alexander Mauchane, a leading advocate of the reign of Queen Mary.<sup>108</sup> Gilbert, as well as undertaking duties within the burgh, was also specially commissioned under great seal letters in 1525 to act with James Johnstone as a justiciar *in hac parte*.<sup>109</sup> The importance of the burgh of Edinburgh and its inhabitants in legal matters is further underlined by the fact that almost a year to the day before this the sons of both these men, Henry Lauder and William Johnstone, were sworn to uphold the office of sheriff of Linlithgow *in hac parte*.<sup>110</sup>

This appointment does not mean that the son had at last wholly eclipsed the father, although it seems clear that Gilbert Lauder remained a major influence on his son. A petition for interdict in 1540 is interesting in this respect. This very common procedure usually involved a young man, often a burgess, whose father was dead and who appeared before the lords seeking to be formally interdicted from alienating his

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<sup>106</sup> For Gilbert as dean of Guild, see C.S. 6/2 fol. 121v: 11 December, 1532. Margaret was married to Gilbert by 1506 and was still married to him in 1510: *Prot. Bk. Foular*, I, nos. 218 (10 Janaury, 1506), 645 (2 May, 1510). If Margaret was the sister of James McCalzeane, then Thomas and Henry would have been first cousins.

<sup>107</sup> Gilbert had remarried by February, 1517: (S.R.O.) G.D. 10/47 (Broughton and Cally Muniments): 9 February, 1517; B22/1/9 fol. 150: 12 February, 1517.

<sup>108</sup> James Kirk, *Patterns of Reform: Continuity and Change in the Reformation Kirk*, (Edinburgh, 1989), 29.

<sup>109</sup> (S.R.O.) J.C. 1/3 (no pagination): 14 August, 1525.

<sup>110</sup> C.S. 5/34 fol. 183r: 21 July, 1524.

heritage without the consent of a named individual, normally an elder relative or friend (and often a man of law), for a specific period.<sup>111</sup> In this case, Thomas Wycht, the twenty-seven year old son of a deceased Edinburgh burgess, sought such an interdict against selling or wadsetting his lands for the period of three years without the 'speciall consent counsall and aviss of honorabill men and his truest frendis Gilbert Lauder and Maister Henry Lauder his sone burgesis of Edinburgh'.<sup>112</sup> Gilbert and Henry, chosen for their legal knowledge and practical experience, are not a surprising choice. But it is revealing that Henry, who had been an advocate in the College of Justice for eight years, king's advocate for two; who had been constituted in 1531 a justice-depute by justice-general, the earl of Argyll, personally, and who had appeared before parliament as the Marischall's deputy, should still be associated with his father in a matter of this kind.<sup>113</sup>

Henry Lauder's early life appears to have followed a pattern familiar to men of law of his generation. He was a graduate by November, 1513.<sup>114</sup> There is no indication of where he studied, although it seems to have been outwith Scotland and France is a strong possibility.<sup>115</sup> By the summer of 1517 he had become a burgess of Edinburgh.<sup>116</sup> Unlike the king's advocate of the time, James Wishart, Lauder was very much part of the mainstream of legal practitioners of his day. By the time he himself took office as king's advocate, he had gained a great deal of legal experience. His first

<sup>111</sup> Balfour mentions the procedure, calling it 'interdictioun' rather than the modern term interdict: *B.P.*, i, 186-7.

<sup>112</sup> C.S. 6/13 fol. 134v: 26 July, 1540.

<sup>113</sup> For Lauder as '*deputato mariscalli*': *A.P.S.*, ii, 352: 26 June, 1538.

<sup>114</sup> *Prot. Bk. Strathauchin*, no. 165: 19 November, 1513.

<sup>115</sup> See chapter three. He does not appear in the list of graduates of Paris university printed by W.A. McNeill, 'Scottish Entries in the *Acta Rectoria Universitatis Parieiensis*', *SHR*, (1964), 66.

<sup>116</sup> *Edin. Burgess Roll*, 298: 14 March, 1517; *R.M.S.*, iii, no. 173: 18 July, 1517.

constitution was 17 July, 1517 although his first appearance before the lords came several months earlier, on 26 March, when he acted for a litigant from Haddington.<sup>117</sup> Fairly soon he could count amongst his clients several earls, including Patrick, Earl Bothwell, David, Earl of Crawford, and Cuthbert, Earl of Glencairn.

Professional success over two decades as king's advocate brought with it extensive rewards in terms of gifts of escheat, nonentry and ward made by James V and during the minority of Mary. In 1540, Lauder received the nonentry of Ballindon in Fife, lands held directly of the king, and twelve years later he received the nonentry of lands in Lauderdale.<sup>118</sup> In tandem with grants of this nature, he also received the escheats of murderers such as Alexander Aldinston and John Scott, and of those who died without having been legitimated, such as John Thomson.<sup>119</sup> More importantly, by avoiding the fate of Adam Otterburn, who was obliged to pay a ruinous fine to avoid execution, Lauder managed both to enjoy his wealth and retain office until his death.<sup>120</sup>

Before concluding it is worth mentioning briefly the two substitute advocates used by Lauder during the 1540s who most merit attention, and who have not been mentioned in detail elsewhere: Thomas McCalzeane and David Borthwick.<sup>121</sup> These men were

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<sup>117</sup> C.S. 5/29 fol. 152v: 26 March, 1517. He was also named in a procuratory, by Master David Lauder, to resign certain lands in February, 1517: (S.R.O.) G.D. 10/47 (Broughton and Caly Muniments): 9 February, 1517.

<sup>118</sup> *R.S.S.*, ii, no. 3713: 7 December, 1540; *R.S.S.*, iv, no. 2073: 24 July, 1553. In 1549 he received the ward and nonentry of lands in Tranent since the death of his neighbour, George, Lord Seton: *R.S.S.*, iv, no. 366: 20 July, 1549.

<sup>119</sup> *R.S.S.*, iii, no. 1655: 8 May, 1546; *R.S.S.*, iv, no. 2791: 4 August, 1554; *R.S.S.*, iv, no. 971: 15 November, 1550.

<sup>120</sup> Otterburn was forced to pay £2000 for a pardon in 1539, and later often complained of his poverty: Inglis, *Otterburn*, 70.

<sup>121</sup> See chapter seven for the dates on which Lauder nominated them his substitutes.

contemporaries at the university of St Andrews in the mid-1520s and, as noted in chapter two, both were assessors of Edinburgh in the 1560s. The comparison does not end there. Both were burgesses: McCalzeane was the second son of an Edinburgh burgess while Borthwick was the eldest son of a burgess of Haddington. Both were also listed amongst the nine general procurators practising before the College of Justice in 1549.<sup>122</sup>

McCalzeane was the son of James McCalzeane, a burgess and notary, who died about 1536.<sup>123</sup> He was probably the nephew of another Edinburgh burgess, Robert McCalzeane, who was escheated for sending gold out of the country without royal licence during the governorship of Albany.<sup>124</sup> Thomas inherited his father's interests in two tenements in the High Street of Edinburgh over the head of his elder brother, a chaplain and notary also called James, which prompted James to raise a summons against him seeking to reduce their father's resignation of these lands in Thomas' favour.<sup>125</sup> The alleged ground of reduction, the law of death-bed, was rejected by the lords although no reason for the judgment was given. Thomas was acting as a procurator before the College of Justice certainly before his father's death.<sup>126</sup>

Borthwick was the son of a Haddington burgess of the same name.<sup>127</sup> In July 1531 he himself became a burgess and, two months later, 'maister Dave' obtained possession

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<sup>122</sup> *A.D.C.P.*, 584.

<sup>123</sup> For James' as a notary, see *Prot. Bk. Foular*, ii, no. 734: 31 August, 1526.

<sup>124</sup> C.S. 5/29 fols. 1v, 35v: 14 and 21 February, 1517. Robert McCalzeane witnessed a charter of sasine to Gilbert Lauder and Margaret McCalzeane in 1510, and through Margaret (his aunt?) Thomas was linked to Henry Lauder: *Prot. Bk. Foular*, I, no. 645: 2 May, 1510.

<sup>125</sup> C.S. 6/10 fol. 88r: 1 June, 1538; James was a notary by 1544: G.D. 12/119 (Swinton Charters): 5 April, 1544.

<sup>126</sup> The first reference to him in the *acta* may be C.S. 6/6 fol. 30r: 1 February, 1535.

<sup>127</sup> David senior was dead by 1540: *R.S.S.*, ii, no. 3383: 19 February, 1540.

of an acre of land within the burgh.<sup>128</sup> His education, part of which may have been abroad, no doubt lies behind his early promotion as one of the bailies of the burgh in October 1531.<sup>129</sup> But promotion had its dangers. In 1532 Borthwick was deformed by two men, one of whom, according to a witness, climbed a stairway and threatened to throw a large stone on his head.<sup>130</sup> Nonetheless, Borthwick had soon come to the attention of the king's secretary, Sir Thomas Erskine of Brechin, and this in turn brought him into contact with James Foulis, Clerk Register, and Nichol Crawford, justice clerk.<sup>131</sup> Borthwick went to France with Erskine and the king in 1536 and by May of the following year his service had been rewarded with the position of captain of Tantallon.<sup>132</sup> The fact that he had to borrow materials from his own burgh demonstrates that the castle had not yet recovered from the siege of 1528.<sup>133</sup> By August, 1537, the castle was in a fit enough state to play host to the king and his secretary.<sup>134</sup> This was not the last service which Borthwick performed for the king, nor did his career in government service end with the king's death.<sup>135</sup> For example, in 1553, having received a gift of the lands of Fenton Barns in East Lothian, the escheat of the late Gavin Borthwick (who had died illegitimate), he was named as one of the

<sup>128</sup> S.R.O. G.D. 1/413/1 (Transcript of Haddington Burgh Court Book): 4 July, 1531; *Prot. Bk. Alexander Symoun*, (S.R.O.) B.30/1/2 fol. 25r: 11 September, 1531. Borthwick subsequently purchased a charter of this land: B.30/1/2 fol. 59r: 16 January, 1534.

<sup>129</sup> S.R.O. G.D. 1/413/1 (Transcript of Haddington Burgh Court Book): 10 October, 1531. The other bailies elected were the master of Hailes and Patrick Lawson.

<sup>130</sup> S.R.O. G.D. 1/413/1 (Transcript of Haddington Burgh Court Book): 26 March, 1532.

<sup>131</sup> Both of whom, along with Borthwick, witnessed one of Erskine's charters: *R.M.S.*, iii, no. 1308: 12 September, 1533. See also, *R.M.S.*, iii, no. 1460: 27 March, 1535, which indicates Borthwick was a notary.

<sup>132</sup> Borthwick at this stage was yet to establish himself as a lawyer. Nonetheless, lawyers were not unheard of as the captains of important strongholds; in 1497 Master William Scott of Balwearie, councillor and man of law, was captain of Falkland: (S.R.O.) G.D. 266 (Crawford Priory Collection): 15 May, 1497.

<sup>133</sup> (S.R.O.) G.D. 1/413/1 (Transcript of Haddington Burgh Court Book): 20 May, 1537.

<sup>134</sup> *R.M.S.*, iii, no. 1704: 18 August, 1537.

<sup>135</sup> In 1540 Borthwick appeared in Haddington with a letter from the king to the council which related that Archibald Borthwick (probably a relative), prebendar of the local kirk, was now in the king's

commissioners to meet an English delegation in the Borders.<sup>136</sup> Borthwick's association with the earl of Arran during this period clearly advanced him and brought some of the rewards which those who held the office of king's advocate in their own right were becoming used to.

Borthwick's early career indicates that James Wishart was not alone in having a background in royal service prior to his appointment as advocate for the king. Even so, it was many years before Borthwick was appointed principal advocate and a great deal had happened in between. The pattern first established with Henryson, a burgess with a university background, is found replicated not only in McCalzeane and Borthwick, but also in Otterburn and Lauder. But it also applied to many men of law who did not rise to the rank of king's advocate. There would appear to be nothing unusual in the backgrounds of these particular men that suited them to such service. Of the group as a whole Wishart was the odd man out, but his appointment was unique and, after his death, it was never again seen to be desirable to combine in one man the offices of king's advocate and justice clerk. Nor does Wishart seem to have gained experience as a substitute for the king's advocate prior to his appointment, unlike Otterburn, Lauder and Borthwick. Personal factors not evident from the record must explain not only why Wishart was chosen in 1513 rather than the more experienced Otterburn, but also why Lauder in due course replaced Otterburn and, indeed, why James Henryson was originally chosen in the first place. It is however tempting to see in the practice of appointing substitutes to act when the advocate was

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service and was to be replaced by a substitute to prevent him losing his prebend through absence: (S.R.O.) G.D. 1.413.1: 8 October, 1540.

<sup>136</sup> R.S.S., iv, no. 1945: 17 April, 1553; R.P.C., I, 150: 18 September, 1553.



occupied elsewhere, the beginnings of a system of evaluating the performance of potential replacements. If Henryson was grooming Otterburn as his replacement, the plan miscarried; and Otterburn himself was in no position to suggest his own successor twenty-five years later.

This chapter should not be concluded without some mention of the downside of acting as advocate for the crown. It has already been seen in the murder of Robert Galbraith that a dissatisfied litigant might resort to drastic measures if he felt cheated of justice.<sup>137</sup> It was not until George Lockhart of Carnwath's murder in 1690 that a king's advocate met the same fate, although there is evidence that things could occasionally become difficult. In 1544, Henry Lauder fell foul of an Edinburgh baker, George Seton, who appears to have laid claim to Lauder's lands of St Germaines in East Lothian. Evidently the dispute ended in violence and Seton, under the nose of his chief and Henry Lauder's neighbour, Lord Seton, was obliged to confess to making 'greit iniure and wrang to Maister Henry Lauder and Agnes Stewart his spouse in the hurting of hir at hir awin place of Sanct Germanis'.<sup>138</sup> As well as making a profuse apology, Seton renounced any rights he may have had to the lands in question. Some twenty years later, Lauder's successor, John Spens of Condie, was subjected to an even more direct attack. One evening in May, 1564, Spens was on his way home to Gilmerton when he and his servants were attacked by a group of nine men. The assault had no serious consequences, perhaps because only one of the assailants was armed, but the reason behind it is obscure. John Ramsay, one of the

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<sup>137</sup> See chapter six.

<sup>138</sup> (S.R.O.) G.D. 3/2/4/3: 1 April, 1544.

attackers, made a formal and grovelling apology before the lords of session for having taken part, alleging that the attack occurred ‘apoun suddantye without ony just occasioun’.<sup>139</sup>

It is a sobering thought that knowledge of these attacks survives only because culprits were caught and forced to apologise on the record. These attacks cannot be linked directly to ongoing activity before the courts but one example of intimidation which can be linked in this way occurred in 1544 and affected Thomas McCalzeane, although he was acting for a private client at the time. In 1546 Robert Douglas of Lochleven deponed before the lords that he had overheard the captain of Edinburgh Castle, James Hamilton, threaten McCalzeane, who was about to appear against him in an action brought by Alexander Sandilands. Hamilton is alleged to have said of McCalzeane, amongst other ‘iniurious wordis’, that ‘he suld have his skin’ if he acted against him.<sup>140</sup> There is no evidence that this threat was made good. Nonetheless, advocacy in general, and for the crown in particular, was liable to make enemies even though, or perhaps because, the rewards were good.

## **Conclusion**

Despite the occasional threat of violence, there is no evidence that any of the early advocates felt the same way as the seventeenth century lawyer Sir John Nisbet, who complained that he had been:

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<sup>139</sup> C.S. 7/31 fol. 53r.

<sup>140</sup> C.S. 6/28 fol. 54r: 3 July, 1546.

‘thrown against my will into the place of Advocate and Lord of the Sessione, my private statione as ane Advocate of the greatest practice being more profitable and more secure...’<sup>141</sup>

although the sentiment may not have been unfamiliar at least to some of them. Rather, the evidence indicates that the rewards of the office could be substantial. Not until Otterburn and Lauder were advocates with a large private practice appointed to serve the Crown. With so little known of the material rewards of private practice, it is impossible to say whether the balance had shifted by Nisbet’s time. In terms of security of tenure, the early king’s advocates had mixed fortunes. Henryson met his death at Flodden along with his king and, as pointed out in the last chapter, might well have been fortunate to escape retribution during the minority of James V had he survived. Wishart also held office until his death. Henry Lauder managed to steer clear of controversy and, unlike Otterburn, retained office until he died in 1561.

What seems certain is that, with the possible exception of James Wishart, the early king’s advocates should be considered part of the mainstream of the legal profession in the sense that they continued to represent private clients during the time they held office. As time went on this becomes less obviously true as administrative and other demands placed upon their time increased. It may be paradoxical, but Henryson, appointed at a time when his appearance before the courts was still something of a novelty, spent a great deal more of his time while he was king’s advocate dealing with private clients than did either Otterburn or Lauder, even though at the date of their respective appointments the latter had amassed many more years of legal experience.

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<sup>141</sup> (S.R.O.) G.D. 6/1005 (Biel Muniments): n.d.

## Conclusion

On 24 July 1535 John Cranston of that Ilk personally pursued a summons against John, Abbot of Lindores, Sir John Jardine, *oeconomus* of the abbot of Kelso, and the king's advocate and erstwhile Border commissioner, Adam Otterburn.<sup>1</sup> The action followed an English raid over the Border almost two years earlier which had resulted, on a day of truce in September 1534, in the Englishmen Hugh Ridley and John Heron being delivered up as hostages to be held until compensation was paid for the damage done during the raid. Ridley was delivered to the custody of the abbot of Kelso, while Cranston received Heron as a hostage. At another day of truce early in July 1535, the English had offered to pay Cranston for the goods which Heron had taken from him during the raid. Royal officials, including Otterburn, James Foulis, Clerk Register, and Thomas Scott, Justice Clerk, prevented Cranston from accepting this offer because they wanted him to keep Heron in his custody as a guarantee that Jardine and the tenants of the abbey of Kelso would be compensated for the injury done to them. This prompted Cranston to appear before the lords of council complaining that Heron had been delivered to him because of the 'scaith' or injury which Heron had done to him, not for the injury he had done to the inhabitants of Kelso.

To the lords sitting in Edinburgh this was merely one case among many resulting from Border raids and they did not hesitate to refer the matter to the warden of the Middle March so that he might deal with it in accordance with the appropriate law and practice. This is in spite of the fact that at this period, and until there were improved

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<sup>1</sup> C.S. 6/6 fol. 197r. Otterburn was part of a commission to the Borders in 1534: Rae, *Administration of the Frontier*, 258.

diplomatic relations with England from 1536, administration of the frontier was inadequate and characterised by ineffective or disorderly days of truce and considerable local feuding.<sup>2</sup>

In the web of jurisdictions in sixteenth century Scotland, the lords regularly referred cases to another forum, such as the court of the admiral or of the bishop's official. The surviving record of the admiral's court, although relatively late, contains the names of many legal practitioners who were not unfamiliar faces to the lords of session.<sup>3</sup> The practitioners before the official of Lothian in the 1540s have also been identified and, although they appear a more coherent and specialised group, some of them certainly had experience in dealing with civil matters before the lords of session.<sup>4</sup> The essential point is that prior to 1550 only a fraction of any legal practitioner's career can be reconstructed. Even if in very rare cases there is evidence that the same man of law followed a case from its hearing before a sheriff up to its hearing in the Tolbooth before the lords, there is no way of knowing how common a practice this was.

Indeed, where the record does survive, as it does for example in relation to the sheriff court of Fife, the indication is that advocates with links to a particular sheriffdom who might be expected to act there regularly, such as Robert Leslie, did not do so. To conclude from this that these advocates were therefore specialists who concerned themselves exclusively with business before the lords of session would however be going beyond the evidence. Although the *acta* of the lords of session provide the best

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<sup>2</sup> Rae, *Administration of the Frontier*, 171-2.

<sup>3</sup> *Acta Curiae Admirallatus Scotiae*, (ed.) T.C. Wade, (Stair Society; Edinburgh, 1937).

<sup>4</sup> Ollivant, *Court of the Official*, 175-6.

evidence for advocates' legal activity, as a source they also have limitations. Appearances by any particular man of law were recorded only on a minority of the days upon which there was a diet of the session, and the lords are recorded as sitting only on a minority of the days of any year. Even in the unlikely event that men of law were present on every day when the lords were recorded as sitting, that would still reveal what they were doing with merely a modest amount of their time. This *caveat* must necessarily be applied to any discussion of these men of law either as individuals or as a group.

More positively, what does emerge from the research presented here is that in the half century or so covered by this study the central administration of civil justice in Scotland underwent significant change. By 1550 a generation had grown up used to professional judges administering the law within the College of Justice in Edinburgh. That professionalism such as this was viewed by contemporaries as a signpost to the future may be demonstrated by the increasing numbers of new professional advocates eager to be admitted to practice before the court during and after the 1550s. These men, like their counterparts on the bench, were following directly in the footsteps of the men appointed in 1532. But, unlike the judges, the general procurators appointed at the foundation of the College of Justice followed a longer tradition of professional legal practitioners whose activities, for the most part, remain hidden from view. It is true that a small proportion of royal councillors and lords of session during the reign of James IV and earlier carried out their responsibilities with a zeal indicative of a professional attitude. Figures both secular and spiritual, such as the Edinburgh burgess and St Andrews graduate Richard Lawson, and William Elphinstone, Bishop of

Aberdeen and student of Glasgow, Paris and Orléans, demonstrated how assiduous judges at the turn of the fifteenth century might be.<sup>5</sup> But in the strictest sense such men were not professional judges. Indeed they themselves followed in the footsteps of men such as the Cologne graduate David Guthrie of Kincaldrum whose royal service as treasurer, comptroller and justiciar during James III's reign was extensive.<sup>6</sup>

Before entering royal service Guthrie himself was a man of law and in this regard he provided no less an example to those men who, at the turn of the fifteenth century, were regularly pleading before the lords. Of these, perhaps John Williamson, James Henryson, Thomas Allan, David Balfour and Matthew Kerr were the busiest.<sup>7</sup> They were all graduates and it is perhaps the case that by the time eight graduates were appointed in 1532 the die had long been cast in this regard. But the story is not quite so simple. Along with the graduates appearing regularly as procurators during James IV's reign were a significant number of men who had not gone to university but who clearly knew the rudiments of legal procedure sufficiently well to represent the interests of others on an occasional basis. The most prominent of these was David Balfour of Caraldstone. By 1532 such figures had not disappeared but they were much less significant. The graduates, and in particular the professional men of law, had taken over to the point where a fairly compact group of them held a dominant position. The appointment of professional judges in 1532 may even have taken its

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<sup>5</sup> Chalmers, *King's Council*, *passim*. Although Chalmers has much to say about Lawson, he dates his death wrongly to 1508 (at 245). Lawson died probably during the summer of 1507: *Prot. Bk. Foular*, ii, no. 340: 25 August, 1507. As for Elphinstone, see Macfarlane, *Elphinstone*, *passim*.

<sup>6</sup> On Guthrie see G. Crawford, *The Lives and Characters of the Officers of the Crown and of the State in Scotland*, (Edinburgh, 1726), I, 360-1; A.R. Borthwick and H.L. MacQueen 'Three Fifteenth Century Cases', (1986), *J.R.*, 149; MacQueen, *Common Law*, 82; Borthwick, *The King, Council, and Councillors*, 293-5.

<sup>7</sup> See Appendix 4.



inspiration from the professionalization of lawyers which was increasingly apparent during the 1520s.

The general procurators of 1532 who form the core of this study were men of differing backgrounds although all were well educated. They also appear to have been competent and honest practitioners. There are very few allegations of sharp practice. True Robert Leslie was posthumously accused of treason (on dubious grounds) while William Johnstone condemned himself as a heretic by fleeing the country. But no allegations of using false evidence, or suborning perjury, were made in regard to them or most of their contemporaries. Nor was it suggested that they were incompetent or greedy men. In practice the professional pleaders appointed in 1532 seem to have been skilled and experienced men with high ethical standards. Allegations of malpractice are very few and far between in the court record.

It is impossible from this distance and with the evidence available to assess adequately the importance of these men on the subsequent development of the legal profession. If such a skilled cadre had not existed in 1532 it is, to say the least, unlikely that the profession would have developed as it did during and after the 1550s. Much remains to be learned of the role which advocates played in the Reformation crisis and during the early years of James VI's reign. In some cases a significant amount is known, on the surface, about their contribution. But men such as James McGill, David Borthwick and Thomas McCalzeane, had long careers and were engaged as the advocates of many distinguished clients. McGill in particular, as clerk register, was in the circle of the earl of Moray and took an active and very public part

at his side in the first trial of Mary, Queen of Scots, which commenced in England in 1568.<sup>8</sup> As a leading Protestant McGill was in October 1574 one of the twelve elders elected to the first Edinburgh kirk session of which record survives.<sup>9</sup> Two other lawyers were also elected as elders in that year, and the following year another four lawyers were elected as elders.<sup>10</sup> Thomas McCalzeane, although not amongst their number, had in the past been an elder. He still managed to involve himself with the kirk session, however, in 1575 when he became embroiled in a dispute at the basis of which was his refusal, having slandered one of Edinburgh's ministers, to perform public repentance.<sup>11</sup> Haughtily refusing to wear sackcloth, declining to sit on the pillar of repentance and preferring instead to bring his own chair, McCalzeane is perhaps the liveliest example of the fact that, in social terms, by the third quarter of the sixteenth century the advocates had well and truly arrived.

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<sup>8</sup> G. Donaldson, *The First Trial of Mary, Queen of Scots* (London, 1969), 115, 119, 120.

<sup>9</sup> Lynch, *Edinburgh and the Reformation*, 269.

<sup>10</sup> Lynch, *Edinburgh and the Reformation*, 271.

<sup>11</sup> Michael F. Graham, *The Uses of Reform: 'Godly Discipline' and Popular Behaviour in Scotland and Beyond, 1560-1610*, (Leiden, 1996), 269.